TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 188.

ADOLPH F. LIPPHARD, WILLIAM A. LIPPHARD, ADOLPH F. LIPPHARD, Jr., ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

IDA P. HUMPHREY, JOHN F. PYLE, GEORGE B. ANDERSON, ET AL.

IN ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 6, 1908.

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In the Court of Appeals of the District of Columbia.

No. 1691.

ADOLPH F. LIPPHARD ET AL., Appellants,
vs.
IDA P. HUMPHREY ET AL.

1 I, Loraine Lipphard, of the City of Washington, in the District of Columbia, do hereby make, publish and declare this as and for my last will and testament, hereby revoking any and all former wills and codicils by me made.

All my property and estate of whatever kind or description, and wheresoever situated, I give, devise and bequeath to Chastain C. Meador, of said City and District, as trustee, in and upon the following trusts and these only, namely:

I. In trust to pay my funeral expenses, the expenses of my last illness, and my just debts, should I have any.

II. In trust for the use and benefit of my dear husband, Adolph Lipphard, all the income, rents and profits arising from my real estate during his natural life, less taxes, insurance and cost of repairs.

III. In trust upon the death of my said husband to pay his funeral expenses, and the expenses of his last illness, should he survive me, or should I die leaving the same undischarged.

IV. Upon the death of my said husband, then in trust to divide my real estate between my five children, John F. Lipphard, William Lipphard, Adolph Lipphard, Sophia Hellen and Capitola Anderson in the following manner:

(1.) To convey to my daughter, Capitola Anderson, her heirs and assigns, the house and lot known as number 474 N Street, S. W., and being part of lot number Thirty four (34), in square numbered Five hundred and Three (503), in said city and District.

2 (2d.) To convey house and lot known as number 472 N St., S. W., and being parts of lots numbered Thirty four (34) and Thirty five (35), in square numbered Five hundred and Three (503), in said city and Dis-

trict, to my daughter, Sophia Hellen, her heirs and assigns, absolutely.

(3d.) To sell and convey house and lot known as number Four hundred and seventy (470) N St., S. W., and being part of lot numbered Thirty-five (35), in square numbered Five hundred and

three (503), in said City and District, and my pictures distributed as follows: Charlotte Corday, Sophia M. Hellen; Mt. Corcoran, Capitola E. Anderson; Vestal Tucia, Adolphus F. Lipphard, Jr.; Vase French Flowers, William A. Lipphard; 2 Landscapes, John F. Lipphard; "Youth," Adolphus F. Lipphard, Jr.; Portrait of Mother, Sophie M. Hellen; Portrait of Father, Capitola E. Anderson; "Old Age," Wm. A. Lipphard; Mater Dolo-rosa, John F. Lipphard; Crayon of Father, John F. Lipphard; Crayon of Ida, Sophie M. Hellen; Crayon of Gussie, Capitola E. Anderson. In case any of my said children shall die before the death of my said husband, whether within my life-time or afterwards, I direct my said trustee to divide the share or shares of such deceased child or children equally, share and share alike, between his, her or their respective children, if any; but if, at the death of my said husband, any of my said children shall be deceased, without leaving any surviving child or children, I direct that the share or shares of such deceased
3 descendant or descendants shall be equally divided, share and share alike, between my surviving children, descendant or descendants then living, if any of my children may have died, their children to stand in the place and instead of their deceased parents, respectively. All the rest and residue of my estate, real, personal and mixed, of which I shall die seized and possessed, or to which I shall be entitled at my decease, I give, devise and bequeath to my said trustee, his heirs and assigns, hereby giving my said trustee full power and authority to sell the same at private or public sale and divide the proceeds between my three sons in the manner before directed.

V. I do hereby appoint and nominate Chastain C. Meador Executor and trustee of this my last will and testament; and I direct that he

3.

shall not be required to give any security for the faithful performance or execution thereof, reposing full confidence in his integrity to perform the trust thus committed to him.

In witness whereof, I hereto put my hand and seal, and publish and declare this to be my last will and testament this 27 day of April, 1898.

her
LORAINE x LIPPHARD. [SEAL.]
mark

Signed, sealed, published and declared by the said Loraine Lipphard, as and for her last will and testament, in the presence of us, who, at her request, and in her presence, and in the
4 presence of each other, have subscribed our names as witnesses thereto.

EVA J. PARKER,
435 4½ *St. S. W.*
HENRY A. LEIMBACH,
415 4½ *Str. S. W.*
JAMES HORAN,
No. 417 4½ *St. S. W.*

(Endorsement: Filed Mar. 2, 1904. Louis A. Dent Register of Wills, D. C. Clerk of Probate Court. Admitted to Probate May 3, 1906.)

5 Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

On the 2nd day of March, 1904, came C. Clinton James and made oath on the Holy Evangels of Almighty God, that he does not know of any will or codicil of Loraine Lipphard late of said District, deceased, other than the aforegoing instrument of writing dated April 27, 1898; that he received the same from Rev. C. C. Meador, Executor named therein, and that said Loraine Lipphard died on or about the — day of ——, 1904.

C. CLINTON JAMES.

Sworn to and subscribed before me.

JOHN R. ROUZER,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

6 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re the Estate of LORAINE LIPPHARD, Deceased. Admn., 12,129.

To the Supreme Court of the District of Columbia, holding a special term for probate business:

The petition of C. C. Meador, respectfully represents:

1st. That he is a citizen of the United States and a resident of the District of Columbia.

2nd. That Loraine Lipphard, late a citizen of the United States and a resident of the District of Columbia, departed this life in said District, on or about the 9th day of December 1903.

3rd. That said decedent left a last will and testament bearing date on or about April 27th, 1898, which is herewith presented for probate and record. That your petitioner was constituted and appointed the sole executor of said will and testament with the request that he be not required to give bond.

That decedent left her surviving as her heirs-at-law and next-of-kin, the following named persons, to wit: her husband, Adolphus F. Lipphard, Sr., grandsons, Edward J. Pyle, John F. Pyle, and a granddaughter, Ida Pyle Humphrey, children of a deceased daughter, Mary Lipphard Pyle, three grandsons, Thomas A. Anderson, George B. Anderson and Robert M. Anderson, and six granddaughters, Mary L. Anderson, Augusta Anderson Erskine, Alice,
7 Ida, Capitola and Helen Anderson, children of a deceased daughter, Alice Lipphard Anderson, a son, John Lipphard, a son, William A. Lipphard, a son, Adolphus F. Lipphard, Jr., a daughter, Sophia Lipphard Hellen, a daughter, Capitola Lipphard

Anderson, all of said heirs-at-law and next-of-kin are residents of the District of Columbia, except Ida Pyle Humphrey, who resides in San Francisco, California, Thomas Anderson, who is temporarily at —— and John Lipphard, who is a resident of the City of Columbus, State of Ohio, and Alice Anderson, who is in a Home for feeble minded children in Philadelphia, Pa. And all of said heirs-at-law and next-of-kin are of lawful age except the said Alice, Ida, Capitola and Helen Anderson, who are infants under the age of twenty-one years.

That said testator died possessed of the following personal estate, to wit, money on deposit in the Equitable Building Association of the District of Columbia, amounting to about one hundred and fifty ($150.00) Dollars and a small quantity of pictures valued at about $200.

Decedent also died seized and possessed of certain real estate, situate in the City of Washington, District of Columbia, to wit: houses Nos. 470-472-474 N street, southwest, Washington, District of Columbia, and being lots —— in Square Five hundred and three (503) valued at about $10000.

Petitioner further states that the only debts left were those in connection with her last illness and funeral expenses which will not in the aggregate amount to more than $200.00. Petitioner therefore prays as follows:

That summons may issue to decedents' heirs-at-law and next of kin who have not signed the waiver of citation hereto annexed
8 to this petition.

Second. That upon the return of said summons, an order of publication may issue, in conformity with the statute, as to such of decedents' heirs-at-law and next of kin as are not served.

Third. That a decree may be passed, admitting said will to probate and record, as a will of personal and real estate, and that letters testamentary issue unto petitioner thereon, upon his giving bond in such penalty as the Court may decree.

Fourth. That petitioner may have such other and further relief as the nature of the case may require.

C. C. MEADOR.

C. CLINTON JAMES,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *To wit:*

I, Chastain C. Meador, being first duly sworn, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof, that the facts therein stated of my own knowledge are true and those stated upon information and belief, I believe to be true.

C. C. MEADOR.

Subscribed and sworn to before me this 18th day of April A. D. 1904.

M. J. GRIFFITH,
Deputy Register of Wills.

9 DISTRICT OF COLUMBIA, *To wit:*

We, the undersigned heirs-at-law and next-of-kin of Loraine Lipphard, do hereby waive citation and pray the court to grant the prayers of the petitioner without further notice to us.

SOPHIE LIPPHARD HELLEN.
CAPITOLA E. LIPPHARD ANDERSON.
JOHN F. PYLE.
EDMUND PYLE.
ROBERT M. ANDERSON.
GEORGE B. ANDERSON.
MARY L. ANDERSON.
AUGUSTA L. ERSKINE.
THOS. A. ANDERSON.

(Endorsement: Petition for probate of will and letters testamentary. Filed Apr. 18, 1904. James Tanner, Register of Wills, D. C., Clerk of Probate Court. C. Clinton James Attorney, 416 5 street, n. w.)

10 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re Estate of LORAINE LIPPHARD, Deceased. Admn., 12,129.

The undersigned one of the heirs-at-law and next of kin of Loraine Lipphard, deceased, having seen and read a copy of the will of Loraine Lipphard, deceased, is willing that the same shall be admitted to probate and record and that the court may pass such further order as it may deem proper without further notice to her.

IDA PYLE HUMPHREY.

(Endorsement: Waiver of Citation of Ida Pyle Humphrey. Filed May 19, 1904. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

11 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re the Estate of LORAINE LIPPHARD, Deceased. Admn., 12129.

To the Supreme Court of the District of Columbia, holding a probate court for said District:

The petition of C. C. Meador, respectfully represents.

That he is a citizen of the United States and a resident of the District of Columbia.

That he is named as Executor and trustee by the will of Loraine Lipphard, deceased, dated, April 27th, 1898 and on file in the office of the Register of Wills. That heretofore to wit, on the 18th day of April 1904, he filed a petition for the probate and record of said will and for letters testamentary.

That all of said heirs-at-law and next of kin have had lawful

notice, except, two who are non residents and an order of publication has been issued against them which is returnable on June 22, 1904.

Petitioner is informed and so believes that some of the heirs-at-law intend to file a caveat to said will which will delay administration on said estate for some time to come.

That said estate consists of pictures, money and real estate under rental and your petitioner is advised that he is entitled to have a collector appointed to care for and preserve said estate until an administrator or executor is appointed.

Wherefore petitioner prays that the court may pass an
12 order appointing some suitable person or persons collector of said estate.

And for such other and further relief as the nature of the case may require.

C. C. MEADOR.

DISTRICT OF COLUMBIA, *To-wit:*

I, C. C. Meador, being first duly sworn on oath say that I have read the foregoing petition by me subscribed and know the contents thereof, that the facts stated therein of my own knowledge are true and those stated upon information and belief I believe to be true.

C. C. MEADOR.

Subscribed and sworn to before me this 25th day of May A. D. 1904.

JAMES TANNER, *Register.*

(Endorsement: Petition for Collector. Filed May 25, 1904. James Tanner, Register of Wills, D. C., Clerk of Probate Court. C. Clinton James 416 5th St.)

13 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re Estate of LORAINE LIPPHARD, Deceased. Admn., 12129.

To the Supreme Court of the District of Columbia, holding a Probate Court for said District:

The Answer of Adolph Lipphard to the Petition of C. C. Meador, Filed in the Above Entitled Matter on the 25th Day of May 1904.

In answer to said petition this respondent respectfully states:

I admit the truth of the allegations contained in the said petition, namely: that the said petitioner is named as Executor and Trustee by a certain testamentary paper of Loraine Lipphard, the deceased wife of this respondent, and that some of the heirs at law intend to file a caveat to said alleged last will.

In further answer to said petition this respondent says that it is his intention to file a caveat to said last will and testament, but

this respondent denies that the said petitioner is entitled to have a collector appointed to care for and preserve the said estate. That the only property belonging to said estate is certain real estate and certain furniture and pictures, and some cash in a Building Association. That both under the law in force in this District
14 in reference to the estate of married women dying intestate, and under the provisions of the alleged last will and testament of the said Loraine Lipphard, this respondent is entitled to all of the rents and revenues arising from said real estate, and that the only services that the collector could perform in reference to said real estate would be to collect the rents and turn them over to this respondent, and which would entail considerable expense which is entirely unnecessary. That the money belonging to said estate is in the Equitable Building Association and is bearing interest and should remain there. That the pictures belonging to said estate are in the home of this respondent and are properly cared for by him and are a part of the furnishings of the house.

Further answering said petition this respondent says that in fact all of the property mentioned and attempted to be disposed of in the alleged last will and testament of Loraine Lipphard, deceased, belongs to this respondent, and all of the money with which the said real estate was purchased belonged to this respondent, and that the said Money in the said Building Association belonged to this respondent, and all of said money was earned by this respondent.

Further answering said petition this respondent says, that if said pictures are taken out of the home of this respondent, they will have to be stored at an expense, and are thereby more apt to be injured than by remaining where they are at present.

That the income derived from said estate is about $38.00, net, a month, and only sufficient to support this respondent, and out of this income this respondent has paid all of the debts of the
15 decedent except the funeral expenses and as to these funeral expenses he has paid $80.00 and leaves due $128.00, for which the undertaker is willing to wait, and which this respondent will pay in the course of the next (6) months.

Your respondent therefore prays, that the prayer of said petition be denied and said petition dismissed.

ADOLPH F. LIPPHARD.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have heard read the foregoing answer by me subscribed and know the contents thereof and that the matters and things therein set forth of my own knowledge are true and those set forth upon information and belief I believe to be true.

ADOLPH F. LIPPHARD.

Subscribed and sworn to before me this 2nd day of June, A. D. 1904.

WM. C. TAYLOR,
Deputy Register.

(Endorsement: Petition of Adolph Lipphard to the petition of C. C. Meador. Filed Jun. 3, 1904. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

16 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In the Matter of the Estate LORAINE LIPPHARD, Deceased. Adm. No. 12129.

To the Supreme Court of the District of Columbia, holding a Probate Court for said District:

The petition of Adolph F. Lipphard, William A. Lipphard and Adolph F. Lipphard, Junior, respectfully represents:

1st. That they and each of them had notice that a certain paper writing bearing date the 27th day of April A. D. 1898, has been filed in the Office of the Register of Wills of the District of Columbia as the last will and testament of Loraine Lipphard, deceased.

2nd. That your petitioner, Adolph Lipphard, is the husband and one of the distributees of the estate of the said deceased and the said William A. Lipphard and Adolph F. Lipphard, Junior, are brothers and two of the heirs at law and next of kin of the said deceased and their interests will be injuriously affected by the allowance of said alleged or pretended last will and testament to be admitted to probate by his honorable court; wherefore they pray leave to file this, their caveat, against said will and ask that they may be heard thereon and that they may have a trial by jury upon the issues herein presented before action is taken by this honorable court

3rd. And for grounds of objection against the said pre-
17 tended will they aver and show, and they verily believe:

1st. They allege that the said paper writing is not the last will and testament of said deceased.

2nd. They allege that the said deceased was not, at the time of the making and subscribing of the acknowledging by her of the said paper writing, of sound mind and memory, or in any respect capable of making a will.

3rd. They allege that the said deceased did not, at the time of making the subscription at the end of said alleged will, or at the time of acknowledging the same subscription to have been made by her to the attesting witnesses to the said paper writing, declare the said paper writing to be the last will and testament of her, the said Loraine Lipphard.

4th. They allege that the attesting witnesses to the said alleged will did not, nor did either of them, sign his or her name as a witness to the said alleged will, at the request of the said Loraine Lipphard.

5th. They allege that the said paper writing, purporting to be such last will and testament, was obtained, and the execution thereof procured, by fraud and circumvention, and undue influence practiced against and upon said Loraine Lipphard by some person or persons unknown to the subscribers.

6th. They allege that the said paper writing was not freely and voluntarily executed or made as her last will and testament by said deceased, but that the subscription thereto and publication thereof

by her was procured by fraud and coercion exercised upon her by some person or persons to the subscribers unknown.

18 Wherefore your petitioners pray:

That the said paper writing may be refused probat-; that issues may be framed between these caveators and contestants and the proponents of the alleged will, and tried before and by a jury according to law.

That your petitioners may have such further relief as the nature of the case may require.

ADOLPH F. LIPPHARD.
WILLIAM A. LIPPHARD.
ADOLPH F. LIPPHARD, JR.

DISTRICT OF COLUMBIA, *ss:*

We do solemnly swear that we have read the foregoing petition by us subscribed and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and the facts therein stated upon information and belief we believe to be true.

ADOLPH F. LIPPHARD.
WILLIAM A. LIPPHARD.
ADOLPH F. LIPPHARD, JR.

Subscribed and sworn to before me this 17th day of June, A. D. 1904.

WM. C. TAYLOR,
Deputy Register.

(Endorsement: Caveat of Adolph F. Lipphard, William A. Lipphard and Adolph F. Lipphard, Junior, to will of Loraine Lipphard. Filed Jun. 17, 1904 James Tanner, Register of Wills, D. C., Clerk of Probate Court. Chapin Brown Charles H. Bauman, Attorneys for Caveators.)

19 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re the Estate of LORAINE LIPPHARD, Deceased. No. 12129, Admn.

To the Supreme Court of the District of Columbia, holding a probate court for said District:

The petition of Rev. Chastain C. Meador, respectfully represents: First: That he is a citizen of the United States and a resident of the District of Columbia, and the executor of the last will and testament of one Loraine Lipphard, late a citizen of the United States and a resident of the District of Columbia, deceased; that petitioner has filed said will in this court; that the same is executed in due form of law to pass real and personal property in this jurisdiction; that heretofore, to wit, on the 18th day of April, 1904, he filed his petition in this court, with the waiver of citation of certain heirs-at-law and next of kin of decedent, for the probate and record of said will.

That certain of testatrix' heirs-at-law and next of kin, to wit, Adolphus F. Lipphard, William Lipphard and Adolphus F. Lipphard, Jr., thereafter, to wit, on June 17th, 1904, filed a caveat to said will; all of which will more fully and at large appear by reference had to the proceedings in this case, which are hereby referred to and made a part hereof.

20 Second: That answer has not yet been made to said caveat, nor have issues been framed therein. Petitioner is advised, and therefore avers that it is his duty to establish and maintain said will; and in order for him so to do, it is necessary that counsel be employed to assist and advise in the framing of said issues, and in the trial thereof; he therefore prays as follows:

First: That an order may be passed by this honorable court, authorizing him to retain counsel to prepare his answer to said caveat, and to assist in framing the issues thereon; and to try the same, and to do all things necessary and proper to be done to establish and maintain said will.

Second: That petitioner may have such other and further relief as the nature of the case may require.

CHASTAIN C. MEADOR.

—— ——,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *To wit:*

I, Chastain C. Meador, being first duly sworn, on oath say that I have read the foregoing petition by me subscribed, and know the contents thereof; that the facts therein stated of my own knowledge are true, and those stated upon information and belief, I believe to be true.

CHASTAIN C. MEADOR.

Subscribed and sworn to before me, this 12th day of July, A. D. 1904.

WM. C. TAYLOR,
Deputy Register.

(Endorsement: Petition of executrix for leave to employ counsel &c. Filed Jul. 18, 1904. James Tanner, Register of Wills, D. C., Clerk of Probate Court. B. F. Leighton, C. Clinton James, Att'ys for petitioner.)

21 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re the Estate of LORAINE LIPPHARD, Deceased. Admn., 12129.

To the Supreme Court of the District of Columbia, holding a probate court for said District:

The answer of Alice, Capitola, Ida and Helen Anderson, by Albert Anderson, their guardian *ad litem*, to the petition of C. C. Meador, filed herein, respectfully represent:

That said respondents are infants of tender years, to wit: the ages of 18, 16, 13 and 10 years respectively, and therefore neither admit nor deny the allegations made in said petition, but submit their rights and interest to the care and protection of the Court:

ALICE ANDERSON,
IDA ANDERSON,
CAPITOLA ANDERSON,
HELEN ANDERSON,
By ALBERT ANDERSON,
Their Guardian ad litem.

DISTRICT OF COLUMBIA, *To wit:*

I, Albert Anderson, guardian *ad litem* of Alice, Ida, Capitola and Helen Anderson, being first duly sworn on oath says that he has read the foregoing answer by him subscribed and knows the contents thereof, that the facts therein stated of his own knowledge is true and those stated upon information and belief, he believes to be true.

ALBERT ANDERSON.

Subscribed and sworn to before me this 22d day of July A. D. 1904.

[NOTARIAL SEAL.]

THOS. E. ROACH,
Notary Public, D. C.

(Endorsement: Answer of Guardian *ad litem.* Filed Jul. 22, 1904. James Tanner, Register of Wills, D. C. Clerk of Probate Court.)

22 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re the Estate of LORAINE LIPPHARD, Deceased. Admn. No. 12129.

To the Supreme Court of the District of Columbia, holding a probate court for said District:

The answer of Chastain C. Meador to so much and such parts of the caveat filed in the matter of the above estate, by Adolph F. Lipphard, William A. Lipphard and Adolph F. Lipphard, Jr., respectfully represents:

First: That your respondent is the executor named in the paper writing purporting be the last will and testament of Loraine Lipphard, bearing date on the 27th of April, A. D. 1898; that the averments made in the first paragraph of said caveat, are, so far as this respondent is concerned, admitted to be true as therein stated.

Second: Answering the second paragraph of said caveat, this respondent states that whether or not the interest of said caveators will be injuriously affected by the allowance and admission to probate of said paper writing by this honorable court as the last will and testament of decedent, is a matter of law, which respondent is advised is

not necessary or material for him to make answer to; touching the other averments, so far as they are material, respondent admits the same to be true.

23 Third: Answering the first clause of the third paragraph of said caveat, this respondent says, upon information and belief, that said paper writing is the last will and testament of said decedent; answering the second clause of said paragraph, respondent states, on information and belief, that decedent was, at the time of making and subscribing or of the acknowledging by her of the said paper writing, a sound mind and memory, and in every respect capable of making a will; answering the third clause of said paragraph of said caveat this respondent states, upon information and belief, that the decedent, at the time of making the subscription at the end of said alleged will, or at the time of acknowledging the same subscription to have been made by her, to the attesting witnesses to the said paper writing, did declare the said paper writing to be her, the said Loraine Lipphard's last will and testament; but respondent further avers that it was not necessary or material for her to have so done, and he claims the same benefit from this his response to said clause of said paragraph of said caveat, as though he had demurred thereto. Answering the fourth clause of said paragraph of said caveat, respondent avers that the attesting witnesses to said will, did, and each of them did, sign his or her name, as a witness thereto, at the request of said Loraine Lipphard. Answering the fifth clause of said paragraph of said caveat, respondent avers that said paper writing, purporting to be the last will and testament of Loraine Lipphard, was not obtained and the execution thereof was not procured by fraud and circumvention and undue influence practice against and upon said Loraine Lipphard by some person or persons unknown to the caveators. Respondent avers upon

24 information and belief that said averments in said clause contained are wholly untrue; on the contrary, he avers, upon information and belief, that said instrument is the free and voluntary act of said decedent. Answering the sixth clause of said paragraph of said caveat, respondent avers that said paper writing was freely and voluntarily executed and made as her last will and testament by said decedent; and that the subscription thereto and publication thereof was not procured by fraud and coercion exercised upon her by some person or persons to the caveators unknown.

Respondent states, upon information and belief, that all the averments in all the clauses of said paragraph of said caveat contained are wholly untrue, and are each and severally denied.

Having fully answered said caveat, this respondent prays to be hence dismissed, with his reasonable costs in this behalf incurred.

CHASTAIN C. MEADOR.

B. F. LEIGHTON,
C. CLINTON JAMES,
Attorneys for Respondent.

25 DISTRICT OF COLUMBIA, *To wit:*

I, Chastain C. Meador, being first duly sworn, on oath say that I have read the foregoing answer by me subscribed, and know the contents thereof; that the facts therein stated of my own knowledge are true, and those stated upon information and belief, I believe to be true.

CHASTAIN C. MEADOR.

Subscribed and sworn to before me, this 29th day of July A. D. 1904.

M. J. GRIFFITH,
Deputy Register of Wills.

(Endorsement: Answer of Chastain C. Meador to caveat filed herein. Filed Jul. 29, 1904. James Tanner, Register of Wills, D. C. Clerk of Probate Court. B. F. Leighton, C. Clinton James, Att'ys for respondent.)

26 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In the Matter of the estate of LORAINE LIPPHARD, Deceased. No. 12129, Admn.

To the Supreme Court of the District of Columbia, holding a special term for orphans' court business:

The petition of Capitola Lipphard Anderson and Sophia Lipphard Hellen, respectfully represents:—

That heretofore, to wit, on the 18th day of April, A. D. 1904, the Rev. Chastain C. Meador exhibited in this court, his petition, stating among other things that Loraine Lipphard, late a citizen of the United States, and a resident of the District of Columbia, departed this life in said District, on or about the nineteenth day of December, A. D. 1903; that she left a last will and testament, dated April 27th, 1898, which was by said petitioner presented for probate and record; that said petitioner was the executor named in said will. The petition also stated that the persons whose names and degrees of relationship to decedent are as follows, were the only heirs-at-law and next of kin of decedent, to wit: Adolphus F. Lipphard, Sr., her husband; William L. Lipphard, John Lipphard and Adolphus F. Lipphard, Jr., her only sons; Sophia Lipphard Hellen and Capitola Lipphard Anderson, (your petitioners), her only surviving daughters; Edward J. Pyle, John F. Pyle and Ida Pyle Humphrey,
27 grandchildren, children of a deceased daughter, Mary L. Pyle; and Thomas A. Anderson, George B. Anderson, Robert M. Anderson, Mary L. Anderson, Augusta Anderson Erskine, Alice Anderson; Ida Anderson, Capitola Anderson and Helen Anderson, children of a deceased daughter, Alice L. Anderson. That of Said heirs-at-law and next of kin, the following have waived citation, to wit: your petitioners, the said Edward J. Pyle, John F. Pyle and

Ida Pyle Pumphrey, and Thomas A. Anderson, George B. Anderson, Robert M. Anderson, Mary L. Anderson and Augusta Anderson Erskine. Of said heirs-at-law, the following named are minors, under the age of twenty-one years, to wit: Alice Anderson, Ida Anderson, Capitola Anderson and Helen Anderson; these have all been brought before the Court by summons or publication, and a guardian-*ad-litem* appointed for them, who has filed his answer herein; and the husband of said decedent, Adolphus F. Lipphard, Sr., and two of her sons, to wit: William L. Lipphard and Adolphus F. Lipphard, Jr., have filed a caveat to said will, alleging, among other things, that said paper writing is not the last will and testament of said decedent, and that said decedent was not, at the time of making and subscribing, or of the acknowledging by her of said paper writing, of sound mind and memory, or in any respect capable of making a will; that she did not, at the time of making the subscription at the end of said alleged will, publish the same as her last will and testament; that the attesting witness to said will, did not sign the same at the request of said Loraine Lipphard; that said paper writing was obtained, and the execution thereof procured, by fraud and circumvention, and undue influence practiced
28 against and upon said Loraine Lipphard by some person or persons unknown to the caveators; and that said paper writing was not freely and voluntarily executed or made as her last will and testament by said decedent, but that the subscription thereof, and publication thereof by her, was procured by fraud and coercion exercised upon her by some person or persons to the subscribers unknown.

To said caveat, an answer was filed by said executor, but the issues have not been framed, nor a trial ordered thereon; all of which will more fully and at large appear by reference had to the proceedings herein, which are prayed to be read and considered in connection herewith.

Second: That after the proceedings had and taken as aforesaid, to wit, on the ninth day of November, A. D. 1904, the said Chastain C. Meador departed this life, at said City and District. Petitioners are advised, and therefore aver, that they are entitled to have said will established, and the provisions therein carried out, so that the purpose and intent of the said testator shall become and remain effective, as intended by her in the making of said will. They further state that they desire to be substituted in the place and stead of the said Chastain C. Meador, deceased, or that some suitable person be appointed by the Court, as administrator of said decedent's estate, with the will annexed, for the purpose of having said will established, and the rights of these petitioners thereunder secured and made effective; and they state, that in their judgment, C. Clinton James, Esq., is such a person; and they hereby consent to his appointment, if the Court shall deem such course proper, as administrator, c. t. a., of decedent's estate; and they do hereby
29 waive any right they may have to administer said estate, in his favor.

Wherefore petitioners pray as follows:—

First: That a decree or order may be passed by this Honorable Court, directing or permitting your petitioners to proceed in the prosecution and trial of the pending issues; and that they, or the said C. Clinton James, Esq., be appointed to administer said estate.

Second: That an order may be passed, authorizing and empowering your petitioners to secure counsel to represent them, or said estate, in the framing and prosecution of said issues.

Third: That they may have such other and further relief, as the nature of the case may require.

CAPITOLA LIPPHARD ANDERSON.
SOPHIA LIPPHARD HELLEN.

B. F. LEIGHTON,
C. CLINTON JAMES,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *To wit:*

Capitola Lipphard Anderson, being first duly sworn, on oath says that she has read the foregoing petition by her subscribed, and knows the contents thereof; that the facts therein stated of her own knowledge are true, and those stated upon information and belief, she believes to be true.

CAPITOLA LIPPHARD ANDERSON.

30 Subscribed and sworn to before us, this 22nd day of November, A. D. 1904.

[NOTARIAL SEAL.]

J. CLARENCE PRICE,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *To wit:*

Sophia Lipphard Hellen, being first duly sworn, on oath says that she has read the foregoing petition by her subscribed, and knows the contents thereof; that the facts therein stated of her own knowledge are true, and those stated upon information and belief she believes to be true.

SOPHIA LIPPHARD HELLEN.

Subscribed and sworn to before me this 22nd day of November, A. D. 1904.

[NOTARIAL SEAL.]

EVA J. DOLAN,
Notary Public, D. of C.

31 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In the Matter of the Estate of LORAINE LIPPHARD, Deceased.
Adm'n, No. 12129.

Upon consideration of the petition of Capitola Lipphard Anderson and Sophia Lipphard Hellen, filed herein on the 23rd day of November, A. D. 1904, it is this 2nd day of December, A. D. 1904, ordered

that petitioners be, and they hereby are authorized and empowered to prosecute the issues raised by the caveat to the paper writing purporting to be the last will and testament of the said Loraine Lipphard, deceased, heretofore filed in this case, in place and stead of the Rev. Chastain C. Meador, the executor of said paper writing, now deceased; and that they be and they hereby are authorized and empowered to employ and retain counsel to defend said will, and the issues to be tried in respect thereto, and to do all things necessary and proper to be done, to maintain and establish the same, and to secure the probate thereof; and it is further ordered that they be and they hereby are authorized to pay such counsel, so retained by them, as aforesaid, a reasonable sum for their services, and to expend such additional sum as may be necessary to secure proper evidence for the trial of said issues; and that such sums so to be expended as aforesaid, shall be allowed and paid out of decedent's estate.

By the Court:

ASHLEY M. GOULD, *Justice.*

(Endorsement: Order authorizing C. L. Anderson, *et al.*, to prosecute issues, retain counsel, etc. Filed Dec. 2, 1904. James Tanner, Register of Wills, D. C. Clerk of Probate Court.)

32 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In the Matter of the Estate of LORAINE LIPPHARD, Deceased. Admn. No. 12129.

Upon consideration of the caveat filed herein to the paper writing dated the 27th day of April, A. D. 1898, purporting to be the last will and testament of Loraine Lipphard, deceased, now pending in this Court for probate and record, as such last will and testament, and of the answer filed thereto by Rev. Chastain C. Meador, the executor of said last will and testament, it is this 2nd day of May, A. D. 1905, ordered that the following issues be, and they hereby are set for trial by a jury in this court:

First: Was the said paper writing, dated April 27th, 1898, the last will and testament of the said Loraine Lipphard?

Second: Was the said paper writing, date April 27th, 1898, purporting to be the last will and testament of the said Loraine Lipphard, deceased, executed and attested in due form as required by law?

Third: At the time of the execution by the said Loraine Lipphard, of said paper writing, dated April 27th, 1898, as her last will and testament, was the said Loraine Lipphard of sound and disposing mind, and capable of executing a valid deed or contract?

33 Fourth: Was the said paper writing, bearing date April 27th, 1898, purporting to be the last will and testament of the said Loraine Lipphard, deceased, procured by the fraud or undue influence practised upon her by any person or persons?

Fifth: Was the signature of said Loraine Lipphard, to said paper

writing, procured by force exercised upon her by any person or persons?

It is further ordered that the foregoing issues be tried before a jury in this court, on the 15th day of May, 1905, provided that ten days prior to the time of said trial, all heirs-at law and next of kin of the said decedent, with all persons claiming under the said paper writing, purporting to be the last will and testament of said decedent, be each served with a copy of said issues, and a notification of the time and place of the trial thereof.

By the Court:

ASHLEY M. GOULD, *Justice.*

(Endorsement: Order settling issues to be tried by jury. Filed May 2, 1905. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

34 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re Estate of LORAINE LIPPHARD, Deceased. Admn., No. 12129.

In appearing to the satisfaction of the Court that the notifications of the trial of the issues heretofore framed in the above entitled cause have been duly served upon Ida, Capitola and Helen Anderson and has been returned "not to be found" as to Alice Anderson and that the order of publication heretofore passed in the above entitled cause has been duly published and that said Alice Anderson is an infant of the age of 19 years and is in a home for feeble minded children, located at Elwyn, Delaware County, Pa., and it further appearing that Ida and Capitola Anderson, have selected as their guardian *ad litem*, their father Albert Anderson, it is this 14th December 1905, ordered that Delmas C. Stutler Esq., be, and he hereby is appointed guardian *ad litem* for said infants to appear for them at the trial of the issues in the above entitled cause.

By the Court:

WENDELL P. STAFFORD, *Justice.*

(Endorsement: Order appointing guardian *ad litem.* Filed Dec. 14, 1905, James Tanner, Register of Wills, D. C. Clerk of Probate Court.)

35 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In the Matter of the Estate LORAINE LIPPHARD, Deceased. Adm., No. 12129.

To the Supreme Court of the District of Columbia, holding a Probate Court for said District:

The petition of Ida Anderson, Capitola Anderson, Helen Anderson and Alice Anderson, by their Guardian *ad litem* Delmas C. Stutler, respectfully represents:

1st. That they and each of them had notice that a certain paper writing bearing date the 27th day of April A. D. 1898, has been filed in the Office of the Register of Wills of the District of Columbia as the last will and testament of Loraine Lipphard, deceased.

2nd. That your petitioners, Ida Anderson, Capitola Anderson, Helen Anderson and Alice Anderson, are the children of the deceased daughter of said decedent and are heirs at law and next of kin of the said decedent, and their interest will be injuriously affected by the allowance of said alleged or pretended last will and testament to be admitted to probate, by this honorable court; wherefore they pray leave to file this, their caveat, against said will and ask that they may be heard thereon and that they may have a trial by jury upon the issues herein presented before action is taken by this honorable court.

36 3rd. And for grounds of objection against the said pretended will they aver and show, and they verily believe:

1st. They allege that the said paper writing is not the last will and testament of said deceased.

2nd. They allege that the said deceased was not, at the time of the making and subscribing or of the acknowledging by her of the said paper writing, of sound mind and memory, or in any respect capable of making a will.

3rd. They allege that the said deceased did not, at the time of making the subscription at the end of said alleged will, or at the time of acknowledging the same subscription to have been made by her to the attesting witnesses to the said paper writing, declare the said paper writing to be the last will and testament of her, the said Loraine Lipphard.

4th. They allege that the attesting witnesses to the said alleged will did not, nor did either of them, sign his or her name as a witness to the said alleged will, at the request of the said Loraine Lipphard.

5th. They allege that the said paper writing, purporting to be such last will and testament, was obtained, and the execution thereof procured, by fraud and circumvention, and undue influence practiced against and upon said Loraine Lipphard by some person or persons unknown to the subscribers.

6th. They allege that the said paper writing was not freely and voluntarily executed or made as her last will and testament by said deceased, but that the subscription thereto and publication
, 37 thereof by her was procured by fraud and coercion exercised upon her by some person or persons to the subscribers unknown.

Wherefore your petitioners pray:

That the said paper writing may be refused probat-; that issues may be framed between these caveators and contestants and the proponents of the alleged will, and tried before and by a jury according to law.

That your petitioners may have such further relief as the nature of the case may require.

IDA ANDERSON,
CAPITOLA ANDERSON,
ALICE ANDERSON,
HELEN ANDERSON,
By DELMAS C. STUTLER,
Their Guardian ad litem.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and the facts therein stated upon information and belief I believe to be true.

DELMAS C. STUTLER.

Subscribed and sworn to before me this 27th day of Feb. A. D. 1906.

WM. C. TAYLOR,
Deputy Register of Wills.

(Endorsement:, Caveat of Ida Anderson, Capitola Anderson Helen Anderson and Alice Anderson, by their guardian *ad litem*, Delmas C. Stutler. Filed Feb. 27, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

38 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In the Matter of the Estate LORAINE LIPPHARD, Deceased. Adm., No. 12129.

Upon motion of Delmas C. Stutler, the duly appointed guardian *ad litem* of Ida Anderson, Capitola Anderson, Helen Anderson and Alice Anderson, and it appearing to the Court that the said guardian *ad litem* has filed a caveat on behalf of said infants to the will of the above named deceased, it is this 27th day of February, A. D. 1906, Ordered: that he be, and he hereby is, authorized to employ counsel to represent him upon the hearing of said caveat and upon the trial of the issues to be framed thereon, the compensation therefor to be hereafter allowed and fixed by the court out of any estate which they may have.

WENDELL P. STAFFORD, *Justice.*

(Endorsement: Order authorizing guardian *ad litem* to employ counsel. Filed Feb. 27, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

39 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of LORAINE LIPPHARD, Deceased. Admn., No. 12129.

Upon consideration of the caveat of Ida Anderson, Capitola Anderson, Helen Anderson and Alice Anderson, by Delmas C. Stutler, their guardian *ad litem*, filed herein this 27th day of February, 1906, to the paper writing dated the 27th day of April, A. D. 1898, purporting to be the last will and testament of Loraine Lipphard, deceased, now pending in this Court for probate and record, as such last will and testament, and of the answers filed thereto this 1st day of March, 1906, it is this 1st day of March, A. D. 1906, ordered that the following issues be, and they are, hereby set for trial by a jury in this court:

First: Was the said paper-writing, dated April 27th, 1898, the last will and testament of the said Loraine Lipphard?

Second: Was the said paper writing, dated April 27th, 1898, purporting to be the last will and testament of the said Loraine Lipphard, deceased, executed and attested in due form as required by law?

Third: At the time of the execution by the said Loraine Lipphard, of said paper writing, dated April 27th, 1898, as her last will and testament, was the said Loraine Lipphard of sound and disposing mind, and capable of executing a valid deed or contract?

40 Fourth: Was the said paper writing, bearing date April 27th, 1898, purporting to be the last will and testament of the said Loraine Lipphard, deceased, procured by the fraud or undue influence practised upon her by any person or persons?

Fifth: Was the signature of said Loraine Lipphard to said paper writing, procured by force exercised upon her by any person or persons?

It is further ordered that the foregoing issues be tried before a jury in this court, on the 19th day of March, 1906, provided that ten days prior to the time of said trial, all heirs-at-law and next of kin of the said decedent, with all persons claiming under the said paper writing, purporting to be the last will and testament of said decedent, be each served with a copy of said issues, and a notification of the time and place of the trial thereof.

By the Court:

WENDELL P. STAFFORD, *Justice.*

(Endorsement: Order framing issues and fixing date for trial. Filed Mar. 1. 1906. James Tanner, Register of Wills, D. C. Clerk of Probate Court.)

41 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In re the Estate of LORAINE LIPPHARD, Deceased. Admn., 12129.

To the Supreme Court of the District of Columbia holding a probate court for said District:

The answer of Sophia Hellen and Capitola Anderson to so much and such parts of the caveat filed in the matter of the above estate, by Ida Anderson, Capitola Anderson, Helen Anderson and Alice Anderson, by their guardian *ad litem*, Delmas C. Stutler, respectfully represents:

First: That your respondents are the caveatees in the above entitled cause and that the averments made in the first paragraph of said caveat, are so far as these respondents are concerned, admitted to be true as therein stated.

Second: Answering the second paragraph of said caveat, these respondents state that whether or not the interest of said caveators will be injuriously affected by the allowance and admission to probate of said paper writing by this honorable court as the last will and testament of *descendant*, is a matter of law, which respondents are advised is not necessary or material for them to make answer to: touching the other averments, so far as they are material, respondents admit the same to be true.

Third: Answering the first clause of the third paragraph of said caveat, these respondents say upon information and belief,
42 that said paper writing is the last will and testament of said decedent; answering the second clause of said paragraph respondents state that decedent was at the time of making and subscribing or of the acknowledging by her of said paper writing, of sound mind and memory, and in every respect capable of making a will; answering the third clause of said paragraph of said caveat, these respondents state upon information and belief, that decedent at the time of making the subscription at the end of said alleged will, or at the time of acknowledging the same subscription to have been by her, to the attesting witnesses of the said paper writing, did declare the said paper writing to be her, the said Loraine Lipphard's last will and testament; but respondents further state that it was not necessary for her to so have done; and they claim the same benefit from their response to said clause of said paragraph, as though they had demurred thereto. Answering the fourth clause of said paragraph, respondents aver that the attesting witnesses to said will did, and each of them did, sign his or her name as a witness thereto, at the request of said Loraine Lipphard. Answering the fifth clause of said paragraph, respondents aver that said paper writing purporting to be the last will and testament of Loraine Lipphard, was not obtained and the execution thereof was not procured by fraud and circumvention and undue influence practiced against and upon decedent by some person or persons unknown to caveators. Respondents aver that said averments in said clause contained are wholly

untrue; on the contrary they aver that said instrument is the free and voluntary act of said decedent. Answering the sixth
43 clause of said paragraph, respondents aver that said paper writing was freely and voluntarily executed and made as her last will and testament by decedent; and that the subscription thereto and publication thereof was not procured by fraud and coercion exercised upon her by some person or persons to the caveators unknown.

Respondents state upon information and belief that all the averments in all the clauses of said paragraph of said caveat contained are wholly untrue, and are each and specifically denied.

Having fully answered said caveat, caveatees pray to be hence dismissed with their reasonable costs in this behalf incurred.

SOPHIA HELLEN AND
CAPITOLA ANDERSON,
By B. F. LEIGHTON &
C. C. JAMES,
Their Attorneys.

(Endorsement: Ans. of Caveatees. Filed Mar. 1, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

44 March 26, 1906. Trial of issues before a jury of Criminal Court No. 2, by consent of Justice Barnard, holding said Criminal Court No. 2.

45 In the Supreme Court of the District of Columbia, Holding a Probate Court.

TUESDAY, *March* 27, 1906.

Mr. Justice Barnard presiding.

In re Estate of LORAINE LIPPHARD, Deceased. No. 12129, Admn. Doc. 32.

IDA P. HUMPHREY, JOHN F. PYLE, GEORGE B. ANDERSON, ROBERT M. ANDERSON, MARY L. ANDERSON, AUGUSTA ANDERSON ERSKINE, SOPHIA L. HELLEN, CAPITOLA L. ANDERSON, EDWARD J. PYLE, and THOMAS ANDERSON (Caveatees), Plaintiffs,

vs.

ADOLPH F. LIPPHARD, WILLIAM A. LIPPHARD, ADOLPH F. LIPPHARD, JR., and IDA ANDERSON, CAPITOLA ANDERSON, HELEN ANDERSON, ALICE ANDERSON by Their Guardian *ad Litem*, DELMAS C. STUTLER (Caveators), Defendants.

Now come here again the parties aforesaid in manner aforesaid and the same jury that was respited yesterday: whereupon the jury, after the case is given them in charge, upon their oath say:

In answer to the first issue:

Was the said paper writing, dated April 27th, 1898, the last will and testament of the said Loraine Lipphard?

They answer "Yes."

46 In answer to the second issue:

Was the said paper writing, dated April 27th, 1898, purporting to be the last will and testament of the said Loraine Lipphard, deceased, executed and attested in due form as required by law?

They answer "Yes."

In answer to the third issue:

At the time of the execution by the said Loraine Lipphard, of said paper writing, dated April 27th, 1898, as her last will and testament, was the said Loraine Lipphard of sound and disposing mind, and capable of executing a valid deed or contract?

They answer "Yes."

In answer to the fourth issue:

Was the said paper writing, bearing date April 27th, 1898, purporting to be the last will and testament of the said Loraine Lipphard, deceased, procured by the fraud or undue influence practised upon her by any person or persons?

They answer "No."

In answer to the fifth issue:

Was the signature of said Loraine Lipphard, to said paper writing, procured by force exercised upon her by any person or persons?

They answer "No."

47 In the Supreme Court of the District of Columbia.

In re Estate of LORAINE LIPPHARD, Deceased. Admn. 12,129.

This cause coming on to be heard upon the pleadings and proceedings herein, and upon consideration of the verdict of the jury upon the several issues framed for trial in this cause, it is this third day of May 1906, adjudged, ordered and decreed that the paper writing filed in this Court and dated April 27th, 1898, purporting to be the last will and testament of Loraine Lipphard, deceased, is said last will and testament and that the same be, and it is hereby, admitted to probate and record as a will of both real and personal property.

From this judgment the caveators, Adolph F. Lipphard, William A. Lipphard, and Adolph F. Lipphard, Jr., and Ida Anderson, Capitola Anderson, Helen Anderson and Alice Anderson, by their guardian *ad litem*, Delmas C. Stutler, note an appeal in open court to the Court of Appeals, which is hereby allowed, and the penalty of the appeal bond to be given to act as a supersedeas is fixed at Five Hundred Dollars. That the said caveators pay the court costs of the proceedings including the costs of publications.

WENDELL P. STAFFORD, *Justice.*

(Endorsement: Decree admitting the will to probate and record and appeal noted. Filed May 3, 1906. James Tanner, Register of Wills, D. C. Clerk of Probate Court. B. F. Leighton, C. Clinton James, Attorneys.)

NOTE.—May 4, 1906. Bond on appeal to act as supersedeas approved and filed.

48 In the Supreme Court of the District of Columbia.

In re Estate of LORAINE LIPPHARD, Deceased. Adm. No. 12,129.

Bill of Exceptions.

Be it remembered that upon the trial of the issues framed in the above entitled cause upon the caveat filed therein, the caveatees, in support of the will of Loraine Lipphard, deceased, and named by the court as plaintiffs in the trial of said caveat to maintain the issues on their art joined, produced as a witness Eva J. Dolan, who testified by deposition *de bene esse* previously taken, that she resided at No. 435, 4½ St. S. W., and was a bookkeeper for her father, Charles H. Parker, a real estate broker, and had been for thirteen years; that she was about to leave the city with her husband who was ill, and did not know when she would return; that she knew Mrs. Loraine Lipphard in her lifetime and was one of the witnesses to her will; thereupon a paper-writing-in-typewriting-consisting of three sheets of paper and a cover, was shown to the witness, and the witness was asked whether or not her signature was on it as one of the witnesses, to which question witness answered, Yes, and that the signatures of the other witnesses were those of Mr. Henry A. Leimbach and Mr. James Horan and that the signature to the will which was by cross-mark was that of Loraine Lipphard; that the will was executed in her presence and in the presence of the other two witnesses; that Mrs. Lipphard made her mark to the will but witness did not know who wrote Mrs. Lipphard's name; that the will was signed at 435, 4½ St. S. W., and was brought there by Mrs. Lippard who said it was her will; that Mrs. Lipphard was of sound mind and capable
49 of executing a valid deed or will; that she had known Mrs. Lipphard intimately all her life; that the will was not read over to Mrs. Lipphard at the time it was signed, and Mrs. Lipphard said that it was her will and she wanted the witnesses to her mark; that she (witness) did not know whether the will had a back on it or whether the sheets were joined together at the time the will was signed; she could not say from recollection whether the two front sheets are the same front sheets as those of the paper she signed at that time; she did not know how many sheets there were to the will at that time; she was sure the will was not at that time read over to Mrs. Lipphard and she (Mrs. Lipphard) did not discuss the contents of the will, but said only that it was her will and she wanted three witnesses to sign it; that she did not know Mr. Lipphard or the children; that after the will was executed it was handed to Mrs. Lipphard and she took it away with her; that Mrs. Lipphard never mentioned the will to witness after she executed it; she saw Mrs. Lipphard about once a month on an average after she (Mrs. Lipphard) executed the will; Mrs. Lipphard would pass the office frequently and she would see her on the street; she (Mrs. Lipphard) would not stop in the office of witness, but she would see her on the street; that she did not tell anyone she had signed the will as a witness except to

Dr. Meador after Mrs. Lipphard died when Dr. Meador told witness that he was executor; that witness did not know Dr. Meador was executor until after Mrs. Lipphard's death, and did not discuss the matter with anyone; that she did not know whether or not Mrs. Lipphard could write; that witness was married about seven years ago, and subsequent to the time of signing the will as a witness.

Thereupon JAMES F. HORAN, a witness for the caveatees, was called and testified in substance that he was a plumber by occupation; that
50 he was one of the witnesses to the will of Loraine Lipphard, with whom he was acquainted during her life; the same paper-writing that was produced and shown to the previous witness, Eva J. Dolan, was thereupon shown to this witness (Horan) who identified his signature as a witness to said paper-writing, also the signature of Mr. Henry A. Leimbach and the mark of Mrs. Lipphard; that he was sent for to go to Mr. Parker's office and found Mrs. Lipphard there sitting at a desk; that Miss Parker, Mr. Leimbach and the witness were present when the will was signed; that Mrs. Lipphard made her cross-mark; that Mrs. Lipphard laughed, and talked in German with Mr. Leimbach and that she was capable in his judgment of making a valid deed or contract; that he could not say who came to get him as a witness; that Miss Parker read something off the will and told him it was a will and that she wanted us as witnesses, and then Mrs. Lipphard said it was her will; that Mrs. Lipphard made her cross mark while he was there; that he does not know in whose handwriting the name "Loraine Lipphard" at the bottom of the paper-writing is; that he does not know whether that name was written while he was there; that he does not remember saying in the presence of Mr. Weitzell, Mr. Bauman and Mr. Brown at the latter's office in June, 1904, that when he signed this paper he thought he was witnessing a paper for Miss Eva J. Parker; that the paper was not read over to Mrs. Lipphard while he was there and he does not know whether or not Mrs. Lipphard could read or write; that he does not know how many pages there were to the paper or whether or not it had a back, and does not know whether the paper-writing was hinged together, and could not identify the first two sheets as part of the paper he signed.

Thereupon HENRY A. LEIMBACH was duly sworn as a witness for the caveatees and testified that his place of business was next door to
51 that of Mr. Horan, the previous witness, and that he had lived in this city about forty-five years and had known Loraine Lipphard about forty years; that she was a mid-wife and had attended his wife; the same paper-writing which had been produced and shown to the next two previous witnesses was shown to this witness (Leimbach), who testified that the signature on the will was his, and the other signatures were those of James Horan and Mrs. Dolan who was Miss Parker at the time the will was witnessed; that the mark was Mrs. Lipphard's and that Mrs. Lipphard could not write; that all three of the witnesses were present at the same time and that Mrs. Lipphard called it her last will and testament; that Mrs. Lipphard was capable at that time of executing a valid deed or

contract; that Mrs. Lipphard could talk German faster than English, and had talked German to him; that she could not write but he did not know whether or not she could read; that Mrs. Eva Dolan said to witness and Mr. Horan that Mrs. Lipphard wanted them to sign her will, and when they went in Mrs. Lipphard said "I have sent for you Gentlemen, to witness my last will and testament;" she was standing up at the time; that he does not know in whose handwriting the name "Loraine Lipphard" is written in the will; that the will was not read over to her at the time of execution; that he does not know whether there was any back on the paper at that time nor how many sheets there were, nor whether the will was or was not typewritten, nor whether the sheet he signed as a witness was attached to the two preceding sheets, but believes they were; that he does not know who wrote the words "her mark," but supposes Mrs. Dolan did that.

Thereupon the caveatees announced their testimony closed, and the caveators moved the court to instruct the jury that there being no evidence that this will was read over to the testatrix, or that she knew or had made known to her the contents of the paper, she being illiterate and unable to read or write, the verdict must be in
52 favor of the contestants on the question of execution and whether it is her will or not her will under the first and second issues, which motion was overruled and an exception duly noted.

The caveators, to prove the issue on their part joined, offered in evidence the paper-writing purporting to be the last will and testament of Loraine Lipphard, deceased, dated April 28th, 1898, and being the same paper-writing offered for probate by the petition of C. C. Meador, filed in the office of the Register of Wills of the District of Columbia April 18th, 1904. It is stipulated and agreed by all the caveators and caveatees, by their respective counsel, that the said paper-writing need not be set forth in this bill of exceptions, but that a true copy of the same shall be inserted in the record on appeal, and made by reference a part hereof.

Thereupon the caveators produced as a witness HENRY THOMFORDT, who testified in substance that he resided at 1317, 4½ St. S. W., and that he had known Mrs. Loraine Lipphard about 25 or 30 years, and knew that she could not speak the German language; that he speaks German and attempted on one occasion to introduce his wife to Mrs. Lipphard in German, and Mrs. Lipphard said to witness, "Henry, you know I can't speak German."

Thereupon SIGMUND J. BLOCK testified that he knew Mrs. Lipphard in her lifetime intimately well for many years, was related to her by marriage; that he could speak German and knew that Mrs. Lipphard could not speak German, and similar testimony as to the inability of Loraine Lipphard to speak German was given by the next witness, who was William A. Lipphard, a nephew of the testatrix and who knew her intimately well.

Thereupon ADOLPH F. LIPPHARD was produced as a wit-
53 ness on behalf of the caveators, and testified in substance that he was the husband of the testatrix, Loraine Lipphard; that he was 86 years of age; that he had been in the leather business for many years but retired from business about three years ago; that he and his wife, Loraine Lipphard, had lived together 65 years up to the time of her death; that she could not speak German, and that she was born in Montreal, Canada, of French parents; that she could not read or write, or sign her name; that he had never seen the paper-writing claimed to be the will of his wife and knew nothing about it; that he and his wife had always lived happily together and that there had never been any secrets kept by one from the other and there was an agreement between them that there never should be; that the real property disposed of by the will was acquired by witness and paid for by him and deeded to his wife, and the personal property disposed of by the will was his property also; that his wife was 82 years of age at the time of her death; that there was also some money in his wife's name belonging to witness at the time of her death, about two hundred and fifty dollars; this money was in the building association at the corner of 9th and F streets; this money came from a life insurance policy which had run out, and witness put it in the bank in her name; that witness did not know that she had made a will and witness thought it was as much in her name as it was in his; the witness further testified in answer to questions by the attorney for the caveators, as follows:

Question. Prior to April 1898, did you ever talk with your wife, or she with you, about how she was going to leave the property after her death? Answer. Yes, sir.

Question. How long prior to that time? A. We all lived
54 together, we worked together, and we never had any disturbances, and we worked together so that we would have something laid by when we were old so that we wouldn't be a burden to the children or anybody else.

Q. Did you talk with her often about it? A. Yes, sir, all the time.

Q. Did you talk with her a year before April 1898? A. Yes, sir.

Q. Did you talk with her about it, or did she talk with you about it six months before that time? A. Yes, sir.

Q. Three months before that time? A. Yes, sir.

Q. What did she say?

Which last question was objected to by the caveatees, by their counsel, and the objection sustained by the court, to which ruling of the court in sustaining said objection the caveators then and there duly excepted.

Witness further testified that his wife talked with him after April 1898, as to how she was going to leave this property; that they talked the matter over. The witness was then asked the following question by the caveators, by their counsel. "What did she say?" To which question the caveatees objected, and the objection was sustained by the court, to which ruling of the court in sustaining the

objection to said last above question, the caveators then and there duly excepted.

This witness further testified that he and his wife were married in 1839 and had fifteen children; that only four are now living, five died in infancy and ten grew to manhood and womanhood; that six lived to be married and had children; that he had numerous grandchildren; that he was at present living with his son Adolph; that up to the time of his wife's death, two daughters, Capitola Anderson and Sophie Hellen, lived with him, but they had left him; that
55 his son John died about six months ago, leaving children; that he knew Dr. Meador, and he and his wife attended his church; that he saw Dr. Meador frequently, but Dr. Meador never told him his wife had made a will; that he was now living at 470 N St. S. W., in one of his houses, and that he rented the other houses, and collected the rents and managed the property; that his wife did not earn much money nursing, he could not tell what kind of a nurse she was, he never bothered much about it, and her nursing did not interfere with her duties at home. Upon cross examination the witness testified that he first went into the leather business for himself on D St. between 8th and 9th Sts.; that he failed in business in 1872, and all his property went to pay creditors; that after the failure, he went into the same business at 625 L St. N. W., and continued in the business until about three years ago; that he made money in the business, and that his wife did not have to help him out but he always took care of her; that his wife was a licensed midwife and attended a great many cases but he could not tell how many cases she had or how many years she was so employed; that he furnished the money for the support of the family; that his wife was an energetic woman and a good wife; that there were two houses built on the property in 1894, and that she attended to that, made the contract, and they both contributed money to pay for the houses; that he never kept an account of what he furnished his wife because what belonged to him belonged to her, and what belonged to her belonged to him; that when he got money he gave it to her; his wife always had a colored woman in the house to do domestic work; that he and his wife boarded with his daughter, Mrs. Capitola Anderson, and that sometimes he paid the board and sometimes his wife did; does not know the amount of board he paid; that Mrs. Anderson left because she bought a house for herself and not because of any trouble that grew out of the will; that he never knew his wife had left a will until he heard Dr. Meador read it after his wife's death; that his wife
never told him that she had made a will; that he put a trust
56 upon this property in March 1857, and the property was sold out under the trust; later he got it back and it was sold out again; once more he got it back, and borrowed the money from the building association to pay for it, and put the title in his wife's name, and that was the way she got it. On re-direct examination the witness testified that in the building of the two houses his son William contributed to the fund for building these houses, but he could not state what the amount was; that he was always in business for himself and paid all the debts against him.

Thereupon ALBERT R. HUMPHREY, a witness called on behalf of the caveators, testified in substance that his wife was a granddaughter of Loraine Lipphard; that he had a conversation with Mrs. Loraine Lipphard about two or three years before she died.

By Mr. BROWN:

Question. Did she tell you how she had left her property, or how she was going to leave it? Answer. Yes, sir.

Q. What did she say to you in reference to that matter?

To which last mentioned question the caveatees, by their counsel, objected. Mr. Brown, counsel for the caveators, stated that he wanted to show that Mrs. Loraine Lipphard denied leaving the property as mentioned in the will and for this purpose asked this witness that question, to which the counsel for the caveatees objected, and the court sustained the objection to said question, to which action of the court in sustaining said objection and in refusing to allow the said witness to answer said question, the caveators, by their counsel, duly excepted.

Thereupon WILLIAM A. LIPPHARD was called as a witness for the caveators and testified in substance that he was a son of the testatrix; that he contributed in all between $1500 and $1600 toward the purchase of the property named in the will; that his mother could not read or write or sign her name, and could not speak German; that he had several conversations with his mother with reference to her will and as to how she intended leaving the property; that one occasion was January 15, 1898, when his mother brought up the conversation.

By Mr. BROWN:

Question. What did she tell you as to how she was going to leave her property?

To which question the caveatees, by their counsel, objected, and which objection was sustained by the court; to which ruling of the court sustaining said objection the caveators, by their counsel, then and then duly excepted.

By Mr. BROWN:

Q. Subsequent to that time, did you have any conversation with her? A. Yes, sir.

Q. When? A. That was in July, 1897; in January, 1897 also.

The COURT: Question. That was before?

Mr. BROWN: Question. I say subsequent to that.

A. Yes, sir.

Q. I mean after 1898? A. Also after, yes. That was in July.

Q. When after 1898 did you have any conversation with
57 her, if any? A. Yes, sir; I had a conversation with her the Sunday before she died.

Q. What was it in reference to? A. In reference to the will.

Q. What was the occasion of this conversation? Was there any particular reason? A. She would bring it up herself. I never asked her.

Q. Did she tell you how she had left the property? A. Yes, sir.
Q. What did she say?

To which question the caveatees, by their counsel, objected, and which objection was sustained by the court; to which ruling of the court sustaining said objection, the caveators, by their counsel, then and there duly excepted.

On cross-examination, witness testified that he was born in 1857; that he was a buyer of furniture for Clark and Davenport; that he was married and had two children, the oldest of which was about 24 years old; that he is unhappily married and does not live with his wife, but has always maintained his family and does so now; that up to about two years ago, he kept a record of the amounts advanced to pay for the family property, and it was in Eugene Carusi's office; that this record ran through a series of years beginning in 1872, and showed the amount he contributed each week from his earnings; that this money was given to his mother; that he never had any trouble with his father; she (his mother) was the only one that knew he was paying this money; that he does not know the value of the property, nor the number of rooms in the houses, nor how wide the houses are; that for about 15 years of the time he was out of town, but sent money to his mother while away, and gave it to her in person when he came home; that his mother told him what she intended to put in her will when she made it, but she never told
58 him that she had made it; that he did not know she had made a will till after her death; that after the death of his mother he purchased his brother John's interest in the property and paid him $500 for it; that no member of the family told him that his mother had made a will.

Thereupon Mrs. Sarah Lipphard, a witness on behalf of the caveators, testified in substance that she was the wife of Adolph Lipphard, the youngest son of Adolph Lipphard; that she saw Mrs. Loraine Lipphard quite often and that Loraine Lipphard's relations with her son Adolph, husband of the witness, was very kindly and very friendly.

By Mr. Brown:

Question. Did you have any conversation with Mrs. Lipphard in reference to any will? Answer. Yes, sir, I did.
Q. When was that conversation? A. Right in her own home, in a little pantry adjoining between the two rooms. She was sick at the time.
Q. When was that conversation? A. About eight or ten weeks before she died.
Q. What was it about? You need not state what she said. A. It was about her will. I asked her if she had made a will.

Mr. Leighton: I object.
The Court: I think that is incompetent.

Q. What did she say in reference to what was in her will and what she had done with her property, if anything?

To which question, the caveatees, by their counsel, objected.

Mr. Brown, counsel for the caveators, stated to the court, and offered to prove by this witness, that this witness had a conversation with Mrs. Loraine Lipphard concerning her will at the time indicated by the above questions and answers, and that the said Loraine Lipphard denied to this witness that she had left her property as, and in the manner stated in the will, and for these purposes asked this witness the above questions which were objected to by Mr. Leighton, counsel for the caveatees, but the said objections to said questions were sustained by the court; to which ruling of the court sustaining said objections, the caveators, by their counsel, then and there duly excepted.

Thereupon CHARLES H. BAUMAN testified that on or about the second day of June 1904, he had a conversation in his office with James Horan in reference to the will of Loraine Lipphard and that the said James Horan at that time said in reference to the will of Loraine Lipphard that when he signed as a witness to a paper there, he thought he was witnessing a paper of and for Miss Eva J. Parker, and similar testimony was given by Charles Weitzell, who was present in Mr. Bauman's office June 2, 1904, and heard James Horan state that when he witnessed the paper supposed to be the will of Mrs. Loraine Lipphard he thought he was witnessing a paper of and for Miss Eva J. Parker.

Thereupon the caveatees called in rebuttal Mrs. CAPITOLA E. ANDERSON, who testified in substance that she was a daughter of
59 the testatrix; that she had been with mother all her life up to the time of her mother's death; that her mother could not speak the German language, but could speak and understand German phrases; that her mother told her she had made a will, but she did not know in whose handwriting the signature to the paper-writing in evidence is.

Thereupon SOPHIA M. HELLEN was called by the caveatees and testified in substance that the testatrix was her mother; that at one time there was a great deal of German used in the family; that her mother understood German well enough to make others understand and she could understand them, but she could not speak German well; that she does not know in whose handwriting the signature to the will is.

Caveatees rest.

It was further shown by the evidence that after the death of Mrs. Loraine Lipphard, C. C. Meador produced the said paper-writing, giving it to Mr. C. Clinton James, who filed it in the office of the Register of Wills of the District of Columbia.

And the foregoing is all the evidence introduced both by the caveators and the caveatees in the trial of the issues in this cause.

Thereupon the caveators, by their counsel, moved the court to instruct the jury to render a verdict upon all the evidence in favor of

the caveators upon the question of execution; or whether it is a will or not a will, that is, upon the first and second issues; to-wit: to the said first issue their answer shall be: No; and to the second issue their answer shall be: No; upon the ground that all of the evidence shows that the said Loraine Lipphard, deceased, was an illiterate woman, and unable to read or write, and there is no evidence that this paper-writing was ever read over to her or that she knew, or had made known to her, the contents of the paper-writing, either before
60 or after the execution of the said paper-writing. But the court refused to grant, and over-ruled, said motion; to which action of the court in refusing to grant and in over-ruling said motion to instruct the jury as prayed, the caveators then and there duly excepted.

The caveatees, by their counsel, moved the court to instruct the jury, that their verdict must be for the caveatees on all the issues.

The court over-ruled this motion to take the case from the jury on the first and second issues, but granted said motion to direct a verdict of the jury in favor of the caveatees, on the third, fourth and fifth issues, on the ground that there is not evidence enough here on the question of testamentary capacity or the issue of fraud or undue influence to go to the jury. To which action of the court in granting said motion to instruct the jury to render a verdict in favor of the caveatees on the third, fourth and fifth issues on the ground that there was not evidence enough here on the question of testamentary capacity or of fraud and undue influence to go to the jury, the caveators, by their counsel, then and there duly excepted.

The court then instructed the jury as follows:

Charge to the Jury.

The COURT: Gentlemen of the jury, the case is so much simplified that I think I will give you the case this afternoon. My instructions will be very brief.

I shall instruct you that in answer to the third issue your answer should be yes; to the fourth issue, no; to the fifth issue, no. That will leave you only two questions to answer: "Was the said paper-writing dated April 27, 1898, the last will and testament of said Loraine Lipphard?" and, second, "Was the said paper-writing, dated April 27, 1898, purporting to be the last will and testament of the said Loraine Lipphard, deceased, executed and attested in due form as required by law?"

61 If she signed that paper as her will, knowing its content and made her mark in the presence of witnesses, requesting them to sign it and witness it as such, it was her will. If she did not do that, the caveatees would fail in their case, and then the only instruction I will give will be as follows:

The jury are instructed that unless they believe and find from all the evidence that the contents of the paper writing was known to Mrs. Loraine Lipphard they must find in favor of the caveators upon the first and second issues, and that in such case their answer to the first issue should be no, and their answer to the second issue should be no.

If, however, the jury should find from all the evidence and circumstances of the case that the said Mrs. Loraine Lipphard did know the contents of said paper and did sign the same by her mark as her will in the presence of the witnesses who signed the same in her presence as witnesses to said will, then their verdict should be in favor of the caveatees and their answer to each of said issues should be yes.

A good deal has been said in regard to suspicious circumstances, as stated by counsel. The paper itself appears in evidence in the hands of the testatrix, and she says it is her will, according to the testimony of the witnesses; but after it is executed it seems to have gotten into the hands of Mr. Meador, who had been her pastor and that of her husband some forty years; and after her death the will comes from the possession of her pastor into the court. It was filed by Mr. James in the office of the Register of Wills, having come directly from the hands of Mr. Meador, who filed the petition for the probate of the will. So that you have those facts and circumstances surrounding the case, from which you are to draw inferences, if any inferences can properly be drawn, as a matter of fact, by you.

62 Take the case, Gentlemen, and answer the questions yes or no.

The caveators, by their counsel, then and there objected, and their objection being over-ruled, they excepted, to that part or portion of said charge of the court to the jury which instructed the jury that in answer to the third issue their answer should be, yes; to the fourth issue, no; to the fifth issue, no; the ground of such objection on behalf of the caveators being, that there *was* sufficient evidence to be submitted to and for the consideration of the jury in determining these last mentioned three issues. The caveators further objected, and their objection being over-ruled, they excepted to that part or portion of said charge which submitted to the jury for their consideration the first and second issues; the ground of such objection on behalf of the caveators being that all the evidence showed that the said Loraine Lipphard, deceased, was illiterate and unable to read or write, and that there was no evidence to be submitted to, or for the jury to consider that the paper-writing was read over to her or that she ever knew or was made acquainted with the contents of the same.

All and each of which several objections and exceptions were severally taken, and noted by the court before the jury retired to consider their verdict, on the minutes of said court at the time same were severally made and taken; and the same are hereby severally signed and sealed by the court this 22d day of June, A. D. 1906, *nunc pro tunc.*

JOB BARNARD, *Justice.* [SEAL.]

We consent.
B. F. LEIGHTON,
C. CLINTON JAMES,
For Caveatees.

63 Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, James Tanner, Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify the foregoing pages, numbered from 1 to 62, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 12,129 estate of Loraine Lipphard, deceased, wherein Adolph F. Lipphard *et al.* appellants, and Ida P. Humphrey *et al* appellees, the same constituting a true, and correct transcript of record of proceedings had in said cause according to the request of counsel filed therein.

I further certify, That the bond for appeal, in the penalty of Five Hundred Dollars (to act as a supersedeas) was duly filed by said appellants, and approved by said Court on the 4th day of May, A. D. 1906.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Probate Court this 26th day of June, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JAMES TANNER,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia supreme court. No. 1691. Adolph F. Lipphard, *et al.*, appellants, *vs.* Ida P. Humphrey *et al.* Court of Appeals, District of Columbia. Filed June 26, 1906. Henry W. Hodges, clerk.

FRIDAY, *November 9th, A. D.* 1906.

No. 1691.

ADOLPH F. LIPPHARD, WILLIAM A. LIPPHARD, ADOLPH F. LIPPHARD, JR., ET AL., Appellants,
vs.
IDA P. HUMPHREY, JOHN F. PYLE, GEORGE B. ANDERSON, ET AL.

The argument in the above entitled cause was commenced by Mr. Chapin Brown, attorney for the appellants, and was continued by Messrs. C. C. James and B. F. Leighton, attorneys for the appellees, and was concluded by Mr. Chapin Brown, attorney for the appellants.

No. 1691.

ADOLPH F. LIPPHARD, WILLIAM A. LIPPHARD, ADOLPH F. LIPPHARD, JR., ET AL., Appellants,
vs.
IDA P. HUMPHREY, JOHN F. PYLE, GEORGE B. ANDERSON, ET AL.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is an appeal from a judgment admitting to probate the will of Loraine Lipphard who died December 9, 1903. The will, executed April 27, 1898, devised and bequeathed the entire estate of the testatrix to the Rev. Chastain C. Meador in trust: (1) To pay all funeral expenses and debts. (2) For the use of her husband, Adolph Lipphard, during his life. (3) To pay the expenses of the said husband's last illness and funeral. (4) Upon the death of said husband to divide the same among five children named, according to the directions therein contained. The trustee was also appointed executor.

Petition for probate was filed April 18, 1904, by the executor, who is now dead. June 17, 1904, Adolph Lipphard, the surviving husband, and William A. Lipphard and Adolph F. Lipphard, Jr., sons of the testatrix, whose interests under the will were very small compared with the others, filed their *caveat* contesting the probate of the will. The grounds of contests alleged therein were: (1) That the paper writing is not the will of the deceased. (2) That deceased was not, at the time of the alleged execution of the paper writing, of sound mind and memory, or capable of making a will. (3) That the deceased did not, at the time of execution, declare the paper to be her will. (4) That the alleged will and its execution were obtained by the fraud and undue influence of persons unknown to the caveators. (5) That the alleged will was not freely executed, but that the subscription thereto, and publication thereof, were procured by fraud and coercion exercised by persons unknown.

Answers having been filed to the caveat, the issues joined were set down to be tried by jury.

The caveatees introduced as witnesses the three subscribing witnesses to the will. The first witness, Eva J. Parker, who had since married a Mr. Dolan, testified that, on April 27, 1898, she was bookkeeper in the office of her father, a real estate broker, at No. 435 Four-and-a-half st. S. W., in the city of Washington, and had known the testatrix intimately all of her life. That the paper writing, consisting of three typewritten sheets, shown to witness, bears her signature as a witness. That testatrix made her mark to the paper in the presence of witness and the other two subscribing witnesses. Testatrix said it was her will. She was of sound mind and capable of making a deed or will. That she said it was her will and wanted witnesses to her mark. That the will was not read to the testatrix nor did she discuss its contents; only said it was her will and she wanted three witnesses to sign it. After execution testatrix took the paper away with her, and did not mention it to witness afterwards. That after the death of testatrix, Dr. Meador said he was her executor, a fact which witness did not before know. That witness did not know whether or not testatrix could write.

James F. Horan identified his signature as a subscribing witness. Said he was acquainted with testatrix and was sent for to come to Parker's office. Testatrix was sitting at a desk. Miss Parker and Mr. Leimbock were present. Testatrix laughed and talked in German with Leimbock. She was capable of making a valid deed or contract. Miss Parker "read something off the will," and told him it was a will and she wanted us as witnesses. Testatrix then said it was her will. She made her cross-mark while he was there. That he does not know in whose handwriting the name "Loraine Lipphard" at the bottom of the paper is. The will was not read over to testatrix while witness was there. Does not know if testatrix could read or write.

The third subscribing witness, Henry A. Leimbock, testified that he wrote his name as witness upon the paper produced as the will, and also to the signatures of the other witnesses. He had known testatrix for forty years. All three witnesses were present when testatrix called the paper her last will and testament. That she made her mark. She was capable at the time of making a valid deed or contract. She could talk German. She could not write, and witness did not know if she could read. When witness and Horan went in, Miss Parker said she wanted them to attest a will. Testatrix said: "I have sent for you gentlemen to witness my last will and testament." He did not know in whose handwriting her name appeared, nor the words "her mark," but supposed that Miss Parker wrote the latter.

Upon the conclusion of this evidence the caveators moved the court to instruct the jury "that there being no evidence that this will was read over to the testatrix, or that she knew or had made known to her the contents of the paper, she being illiterate, and unable to read or write, the verdict must be in favor of the contestants on the question of execution and whether it was her will or not her will

under the first and second issues." This was denied, and exception noted.

The will was then offered and read. Adolph F. Lipphard, the husband of testatrix, testified on behalf of the caveators substantially as follows: He and testatrix had lived together sixty-five years. She was aged eighty-two years at the time of her death. His testimony tended to show that the property in the name of his wife had been acquired in great part by his efforts, etc. She could neither read nor write. They lived happily. He never saw the will. Had talks with her about the way she intended to leave the property a year before April, 1898, and three months before her death. When asked what she said objection was made and sustained, and exception reserved. He knew nothing of the will until it was read to him by Dr. Meador after his wife's death. Both attended Dr. Meador's church. Other witnesses were called and asked to tell what testatrix had said to them about the disposition of her property—most of this occurring not long before her death. The testimony was excluded upon objection.

In the examination of only one of these witnesses was the statement made of what was expected to be proved by these declarations. The witness was Sarah Lipphard, a daughter-in-law of testatrix. The statement of what was to be proved by her was, that eight or ten months before her death, testatrix declared to her that she had left her property in a manner different from that recited in the will produced.

It was proved by the caveatees that Dr. Meador produced the will after testatrix's decease, and gave it to an attorney to file in the office of the register of wills.

On conclusion of all the evidence, caveators renewed their motion made at the close of the proof of execution, and on the same grounds, which was again denied. Caveatees moved an instruction to find for them on all issues. The court overruled this as to the two issues relating to execution, and granted it as to the remaining issues relating to fraud and undue influence.

The court then charged the jury that unless they believed that the contents of the paper were known to testatrix at the time of execution, they should find for the caveators. If, however, they should find from the evidence that testatrix did know the contents of the paper, and did sign the same by her mark, as her will, in the presence of witnesses, who signed the same as witnesses in her presence, the verdict should be in favor of the caveatees.

The jury returned answers to all of the issues favorably to the caveatees; and from the judgment thereon entered probating the will this appeal has been prosecuted.

When or by whom the will of Loraine Lipphard was written does not appear in the evidence, but there is not a single circumstance of suspicion attending its execution. Though an aged and illiterate woman, she was of sound mind and body at the time. Bearing the instrument, she went alone to the office of a young lady whom she well knew. She said it was her will, and that she had come to have its execution attested by three witnesses, which number was then required to a will creating an estate in land. The two other wit-

nesses sent for were acquaintances, one of them for forty years. She declared the instrument to be her last will, and asked them to attest it. She affixed her mark to it in their presence, and they then and there signed as witnesses. The witnesses were competent persons, evidently intelligent, had no interest whatever in the will, and no attempt was made to impeach their credibility. When the act was complete the testatrix departed with the paper, and evidently delivered it to the pastor of her church, who was made executor and trustee.

Under such conditions the court was undoubtedly right in denying the appellant's motion to direct a verdict for them, on the issue of due execution, because the will was not read to the testatrix at the time of execution and attestation. If possessed of the necessary capacity, persons illiterate as well as literate can dispose of their property by will. No distinction is made between them in the former or existing statutes regulating the making of wills, and the procedure for their probate. In all cases the subscribing witnesses, if living and within the jurisdiction, must be called to prove the fact of execution; and if it appears from their evidence that the will was formally executed, and the testator competent, it must be admitted to probate. Code section 1626, 131, 132, 134.

It is a settled rule, under such statutes, that if a person of sound mind executes a will, and the same is his voluntary act, the law presumes knowledge on his part of its contents. (Taylor *v.* Creswell, 45 Md., 422, 431.)

The appellants concede this where the testator is able to read the instrument, but deny its application where he is unable to do so.

Illiterate persons, as well as others, may wish the contents of their wills to remain unknown to all but the confidential scrivener. Being of sound minds, and having satisfied themselves in their own way that the will has been written as directed, they may call in witnesses and execute it by affixing their marks, or having their names signed, without having the contents again made known to them. There is no good reason for excluding them from the benefit of the presumption which attaches to the same acts when performed by persons able to read and write. The great weight of authority is opposed to making such an exception to the general rule. (Shanks *v.* Christopher, 3 A. K. Marsh, 144; Boyd *v.* Cook, 3 Leigh, 32, 51; Hashauer *v.* Hashauer, 26 Pa. St., 404, 406; Vernon *v.* Kirk, 30 Pa. St., 218, 224; King *v.* Kinsey, 74 N. C., 261, 263; Guthrie *v.* Price, 23 Ark., 296, 407; Clifton *v.* Murray, 7 Ga., 564; Doran *v.* Mueller, 78 Ill., 342, 346; Browning *v.* Budd, 6 Moore, P. C. C., 430, 445.)

The majority of the cases cited by the appellants maintain the view that the presumption that a testator knew the contents of the instrument, the execution of which he called the witnesses to attest, and that it expressed his will, stands unless there are attending circumstances leading to a different conclusion. As we have seen, there were no such circumstances in this case.

Passing to the question raised on the second assignment of error, we think it equally clear that there was no error in excluding the evidence of declarations made by the testatrix concerning the contents of her will. Evidence of the declarations of a testator are

sometimes admissible in cases where the mental capacity of the testator is in issue, not however, as proof of the facts declared, but as tending to show the condition of mind at the time of execution. (Throckmorton *v.* Holt, 180 U. S., 552, 573.)

In this case, the mental capacity of the testatrix was clearly proved, and there was no evidence whatever tending to dispute the fact. Moreover, the declarations had no tendency to show the want of mental capacity. The sole object of the proposed evidence was necessarily to show that because the testatrix had, some time after executing the will, made declarations indicating that she had made a different disposition of her property from that recited therein, she could not have known the contents at the time of its execution. The proposition is without foundation, either on principle or authority.

The judgment was right and will be affirmed with costs.

Affirmed.

WEDNESDAY, *November 21st, A. D.* 1906.

No. 1691, October Term, 1906.

ADOLPH F. LIPPHARD, WILLIAM A. LIPPHARD, ADOLPH F. LIPPHARD, JR., ET AL., Appellants,

vs.

IDA P. HUMPHREY, JOHN F. PYLE, GEORGE B. ANDERSON, ET AL.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.
November 21, 1906.

TUESDAY, *December 4th, A. D.* 1906.

No. 1691.

ADOLPH F. LIPPHARD, WILLIAM A. LIPPHARD, ADOLPH F. LIPPHARD, JR., ET AL., Appellants,

vs.

IDA P. HUMPHREY, JOHN F. PYLE, GEORGE B. ANDERSON, ET AL.

On motion of Mr. Chapin Brown, of counsel for the appellants, It is ordered by the Court that an appeal and writ of error to remove this cause to the Supreme Court of the United States be and the same are hereby allowed, and the bond to act as supersedeas on said appeal and writ of error is hereby fixed at the sum of five hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., *et al.* Appellants and Ida P. Humphrey, John F. Pyle, George B. Anderson *et al.* a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of December, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Adolph F. Lipphard, William A. Lipphard and Adolph F. Lipphard, Jr. (by the style of A. F. Lipphard, Jr.), and Ida Anderson, Capitola Anderson, Helen Anderson, and Alice Anderson, by their guardian, *ad litem*, Delmas C. Stutler, as principals, and The United States Fidelity and Guaranty Company, a Corporation of the State of Maryland, as surety, are held and firmly bound unto Ida P. Humphrey, John F. Pyle, George B. Anderson, Robert M. Anderson, Augusta Anderson Erskine, Sophia L. Helen, Capitola L. Anderson, Edward J. Pyle and Thomas Anderson in the full and just sum of Five hundred dollars to be paid to the said Ida P. Humphrey, John F. Pyle, George B. Anderson, Robert M. Anderson, Mary L. Anderson, Augusta Anderson Erskine, Sophia L. Helen, Capitola L. Anderson, Edward J. Pyle and Thomas Anderson, their certain attorney, executors, administrators, or assigns; to which payment, well and

truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth (5th) day of December, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., and Ida Anderson, Capitola Anderson, Helen Anderson, Alice Anderson, by their guardian *ad litem,* Delmas C. Stutler, and the said Ida P. Humphrey, John F. Pyle, George B. Anderson, Robert M. Anderson, Augusta Anderson Erskine, Sophia L. Helen, Capitola L. Anderson, Edward J. Pyle, Thomas Anderson a judgment was rendered against the said Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., and the said Capitola Anderson, Helen Anderson, Alice Anderson, by their guardian *ad litem* Delmas C. Stutler and the said Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., and the said Ida Anderson, Capitola Anderson, Helen Anderson, Alice Anderson, by their guardian *ad litem,* Delmas S. Stutler, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and also having prayed and obtained an appeal to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Ida P. Humphrey, John F. Pyle, George B. Anderson, Robert M. Anderson, Mary L. Anderson, Augusta Anderson Erskine, Sophia L. Helen, Capitola L. Anderson, Edward J. Pyle, and Thomas Anderson citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., and Ida Anderson, Capitola Anderson, Helen Anderson and Alice Anderson, by their guardian *ad litem,* Delmas C. Stutler shall prosecute said writ of error and appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ADOLPH F. LIPPHARD. [SEAL.]
WM. A. LIPPHARD. [SEAL.]
A. F. LIPPHARD, JR. [SEAL.]
DELMAS C. STUTLER, [SEAL.]
Guardian ad litem for Ida Anderson, Capitola Anderson, Helen Anderson, and Alice Anderson.
THE UNITED STATES FIDELITY & GUARANTY CO.,
By LEE B. MOSHER, *Attorney in Fact.*

[Seal of The United States Fidelity & Guaranty Co.]

Sealed and delivered in the presence of—
RAYMOND S. TOMPKINS.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1691. Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., *et al.* appellants, *vs.* Ida P. Humphrey, John F. Pyle, George B. Anderson, *et al.* Supersedeas Bond on Appeal and Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Dec. 6, 1906. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Ida P. Humphrey, John F. Pyle, George B. Anderson, Robert M. Anderson, Mary L. Anderson, Augusta Anderson Erskine, Sophia L. Hellen, Capitola L. Anderson, Edward J. Pyle, and Thomas Anderson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard Jr. and Ida Anderson, Capitola Anderson, Helen Anderson, Alice Anderson by their Guardian *ad Litem,* Delmas C. Stutler, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of December, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 6th day of December A. D. 1906.
B. F. LEIGHTON.
C. CLINTON JAMES.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 6, 1906. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Ida P. Humphrey, John F. Pyle, George B. Anderson, Robert M. Anderson, Mary L. Anderson, Augusta Anderson Erskine, Sophia L. Hellen, Capitola L. Anderson, Edward J. Pyle, and Thomas Anderson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr. and Ida Anderson, Capitola Anderson, Helen Anderson, Alice Anderson by their Guardian *ad Litem,* Delmas C. Stutler, are plaintiffs in error, and you are defendants in error, to show cause, if any

there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of December, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

B. F. LEIGHTON.

Service accepted this 6th day of December A. D. 1906.
B. F. LEIGHTON.
C. CLINTON JAMES.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 6, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 44, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., *et al.*, Appellants, *vs.* Ida P. Humphrey, John F. Pyle, George B. Anderson, *et al.* No. 1691, October Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of December A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,509. District of Columbia court of appeals. Term No. 188. Adolph F. Lipphard, William A. Lipphard, Adolph F. Lipphard, Jr., *et al.*, plaintiffs in error and appellants, *vs.* Ida P. Humphrey, John F. Pyle, George B. Anderson, *et al.* Filed January 5th, 1907. File No. 20,509.

IN THE

Supreme Court of the United [illegible]

No. 198.

ADOLPH L. LIPPHARD ET AL., APPELLANTS,

vs.

IDA P. HUMPHREY ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLANTS.

CHAPIN BROWN,
CHARLES H. BAUMAN,
J. P. BARNEY,
Attorneys for the Appellants.

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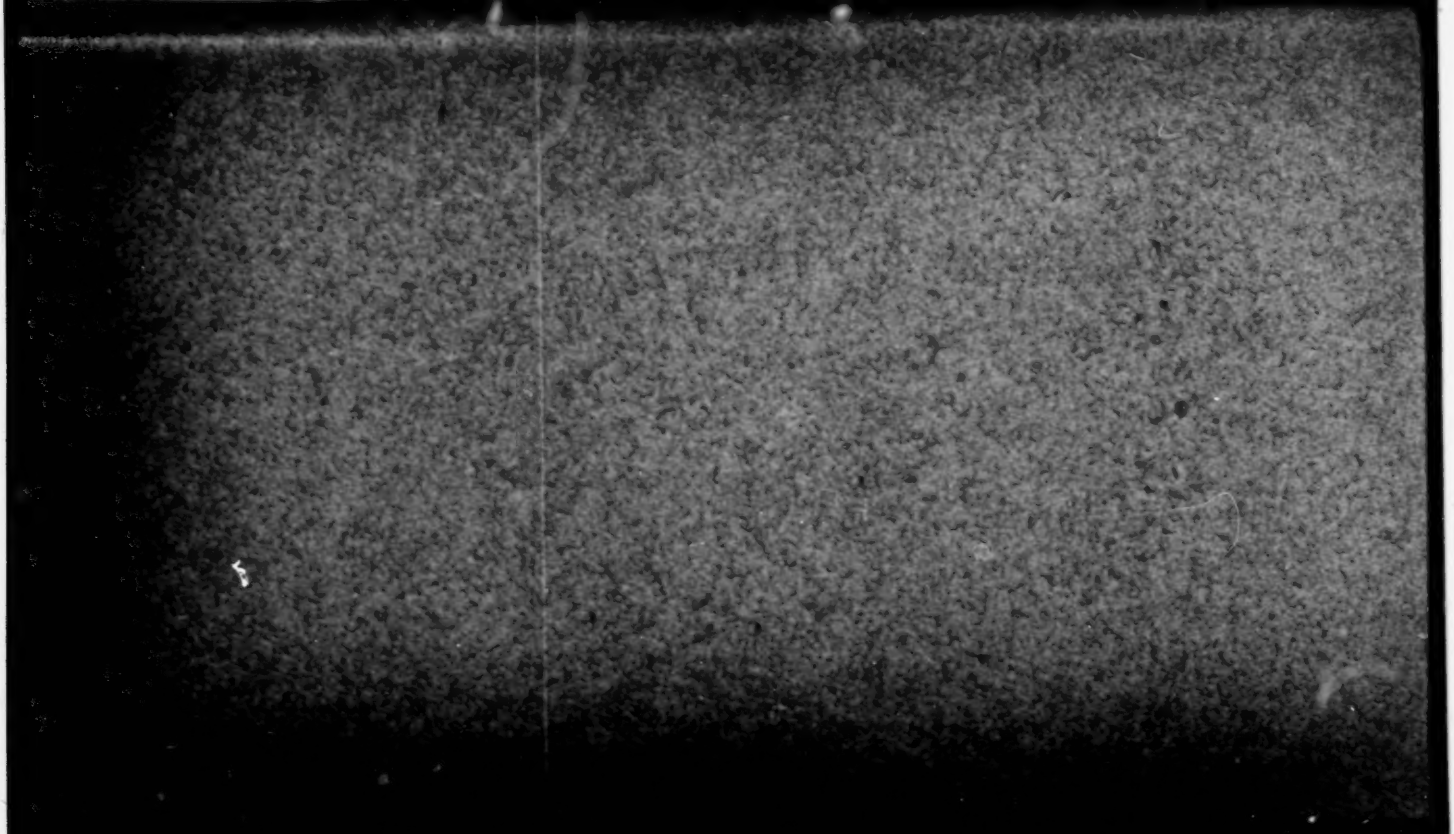

IN THE

Supreme Court of the United States.

No. 188.

ADOLPH L. LIPPHARD ET AL., APPELLANTS,

vs.

IDA P. HUMPHREY ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLANTS.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia affirming a judgment of the court below entered upon the verdict of a jury upon issues framed upon a caveat filed to the probate of a paper writing alleged to be the last will and testament of Loraine Lipphard, Adm. No. 12,128, the verdict of the jury being that the said paper writing was the last will and testament of the said Loraine Lipphard, and the judgment thereon admitting said paper writing to probate and record as a will of both real and personal property.

Statement of the Case.

The testimony in this case discloses the following state of facts: Loraine Lipphard, an illiterate woman, unable to read or write or sign her own name, died in the city of Washington on or about the 9th day of December, 1902,

aged 82 years. After her decease a paper writing alleged to be the last will and testament of the said Loraine Lipphard, deceased, dated April 27, 1898, and signed by her mark (Record, pp. 1 and 2) was produced by the person named as executor therein and filed in court by his attorney, C. Clinton James, Esq., with a petition by the executor (Record, pp. 3 and 4), for the probate of said paper writing as and for the last will and testament of the said Loraine Lipphard filed April 18, 1904. To this petition for probate, a caveat was filed by certain of the heirs of the said Loraine Lipphard, deceased (Record, pp. 8 and 9), and issues framed upon said caveat submitting to a jury for trial the question whether the paper writing dated April 27, 1898, was the last will and testament of said Loraine Lipphard, whether the said paper writing was executed and attested in due form as required by law by the said Loraine Lipphard; whether at the time of the execution of said paper writing the said Loraine Lipphard was of sound and disposing mind, and capable of executing a valid deed or contract; whether the said paper writing was procured by fraud or undue influence practised upon the said Loraine Lipphard by any person or persons; and whether the signature of the said Loraine Lipphard to said paper writing was procured by force exercised upon her by any person or persons, as more fully appears from a complete statement of said issues in the record (pp. 16 and 17). Upon the trial of the issues framed upon said caveat, the court named the caveatees as plaintiffs and the caveators as defendants, and the caveatees proved by the subscribing witnesses to the paper writing that they witnessed the paper writing at the request of Loraine Lipphard who said it was her will, but that the paper writing was not read over to the testatrix nor did it appear that she knew or had made known to her the contents of the paper at the time of the execution thereof; that two of the witnesses did not know whether or not Mrs. Lipphard could read or write, while the third wit-

ness knew that she could not write, but did not know whether she could read or not (Record, pp. 24, 25, and 26).

It subsequently appeared, and was admitted as a fact in the case that the alleged testatrix "could not read or write or sign her name" (testimony of Adolph F. Lipphard, Record top p. 27), and there was, therefore, no question of fact in this regard for the jury to determine.

Thereupon the cavatees announced their testimony closed, and the caveators moved the court to instruct the jury that there being no evidence that this alleged will was read over to the testatrix or that she knew or had made known to her the contents of the paper, she being illiterate and unable to read or write the verdict must be in favor of the caveators on the question of execution and whether it is her will or not her will under the first and second issues, which motion was overruled and an exception duly noted (Record, p. 26).

Thereupon the caveators produced a number of witnesses who testified that Loraine Lipphard, deceased, was illiterate and unable to read or write or to sign her name, and further offered to prove statements of the testatrix before the execution of the alleged will in which the testatrix stated how she was going to leave her property, and also statements of the testatrix after the execution of the alleged will as to the manner of the disposition of her property therein, which statements were different from and inconsistent with the provisions contained in the alleged will, and also offered to prove that testatrix denied having left her property in accordance with the provisions of the alleged will, but the caveatees objected to said offers and to the admission of such testimony, and the objections of the caveatees were sustained by the court and exceptions duly noted by the caveators (Record, pp. 27 to 31).

At the conclusion of their testimony, the caveators moved the court to instruct the jury to render a verdict upon all the evidence in favor of the caveators upon the question of execution or whether it is her will or not her will upon the

first and second issues, upon the ground that all of the evidence shows that the said Loraine Lipphard, deceased, was an illiterate woman, and unable to read or write or sign her name, and there is no evidence that this paper writing was ever read over to her or that she knew or had made known to her the contents of the paper writing, either before or after the execution of the said paper writing, but the court refused to grant said motion and overruled same, to which action of the court exception was duly noted by the caveators (Record, pp. 31 and 32).

The court, on motion of the caveatees, directed the jury to find a verdict for them on the third, fourth, and fifth issues on the ground that there was not evidence enough here on the question of testamentary capacity or the issue of fraud or undue influence to go to the jury, to which ruling of the court exception was duly noted by the caveators. The caveators further objected, and their objection being overruled they duly excepted, to the submission by the court to the jury of the first and second issues on the ground that all the evidence showed that the said Loraine Lipphard, deceased, was illiterate and unable to read or write, and that there was no evidence to be submitted to the jury, and none for them to consider, that the paper writing was read over to her or that she ever knew or was made acquainted with the contents of the same (Record, p. 32).

Assignment of Error.

The court below erred—

(1) In holding that proof only of the signing and acknowledging of the paper writing, without further proof of actual knowledge by the alleged testatrix of its contents, was sufficient evidence to be submitted to and considered by the jury in determining the two questions in issue, namely, as to whether the alleged paper writing was her will (1st issue), or whether it was duly executed, as required by

law (2d issue); the alleged testatrix being shown by all the evidence to be a person unable to read or write; and

In refusing to allow caveators (defendants below) to offer testimony tending to show affirmatively that the alleged testatrix did not know the contents of the said paper writing (Record, top of p. 31 and top of p. 29).

(2) In submitting to the jury in the final instructions or charge of the court below (Record, p. 33) for its determination the question whether "the said Loraine Lipphard did know the contents of said paper" (Record, top p. 33), there having been no evidence offered by the plaintiff below (caveatees) that she did know its contents, and the court below having further refused to allow the defendants below (caveators) to show *affirmatively* by evidence that she *did not* know its contents (Record, top of p. 31, and top of p. 29, exception).

(3) In refusing to grant the motion of the caveators to instruct the jury to return a verdict upon all the evidence in favor of the caveators on the ground that all of the evidence shows that the deceased was an illiterate woman, unable to read or write or to sign her name, and there is no evidence that the alleged will was ever read over to her, or that she knew or had made known to her the contents of the alleged will.

(4) In submitting to and for the determination by the jury the first and second issues.

(5) In directing a verdict for the caveatees on the third, fourth, and fifth issues.

(6) In refusing to admit the declarations of the alleged testatrix offered by the defendants below (caveators and appellants in this court), made both before and after the date of the said paper writing, which declarations were offered to be proven in evidence for the purpose of showing mental incapacity and undue influence.

(7) In refusing to allow the caveators, defendants below (appellants) to offer, in support of or in reference to any of

the issues involved in the case, or for any purpose, evidence of declarations of the alleged testatrix, made *before* and *after* the date of the alleged will.

ARGUMENT.

There are two principal questions of law which will be relied upon as reversible error in the court below. The other assignments of error are collateral to and dependent upon the determination of these two. The two principal questions of law to be first determined are:

First Question to be determined.—The evidence established as an undisputed fact in the case, that this alleged testatrix "could not read or write or sign her name" (testimony of Adolph F. Lipphard, Record, top p. 27); that the paper-writing was not read over to her when executed; nor was it shown that she was ever made acquainted with its contents in any way (Record, pp. 24, 25 and 26). The evidence showed that she appeared alone at a real estate office with a typewritten paper of three sheets, and informed the witness, Eva J. Dolan, "that it was her will and she wanted three witnesses to sign it"; that Mrs. Lippard, the alleged testatrix, took the paper away with her after it had been signed by her mark, in the presence of the three witnesses, without being read to her (Record, p. 24); that C. C. Meador produced the said paper-writing after Mrs. Lipphard's death, giving it to Mr. C. Clinton James, who filed it in the office of the Register of Wills (Record, bottom p. 31). This was all the evidence bearing upon the execution of the will or the knowledge of the alleged testatrix of its contents. The court rejected other and affirmative proof offered by the appellants, bearing upon the question of the want and absence of knowledge of the alleged testatrix of the provisions or contents of the paper-writing.

as will be shown below under the heading "Second Question to be determined."

The court below held that the above recited testimony, without any testimony being produced by the appellees tending to show that she was ever made acquainted in any way with its contents, was sufficient to go to the jury upon which to determine the first issue, namely: "Was the said paper-writing, dated April 27, 1898, the last will and testament of the said Loraine Lipphard?" and was sufficient evidence on which (to use the language of the trial court in his charge to the jury, at page 33 of the Record) they might "find from all the evidence and circumstances of the case that the said Mrs. Loraine Lipphard *did know* the contents of said paper-writing" (Record, exception taken at close of caveatees' testimony, middle page 26; and exception taken at close of all the testimony, commencing at bottom p. 31; and exception taken to the court's charge, p. 33). We respectfully submit that this was error.

Second Question to be determined.—The court below having held that the above recited testimony was sufficient to be submitted to the jury on which they might find the fact that Mrs. Lipphard knew the contents of the paper-writing, the appellants then offered testimony tending to prove that she *did not* know the contents of said paper-writing. This testimony was in the form of declarations of Mrs. Lipphard made both immediately before and after the execution of the paper-writing. All of this evidence was rejected by the court below and exceptions duly noted (Record, pp. 27, 28, 29, 30 and 31). It is respectfully submitted that this was clearly reversible error. Under the law applicable to this case, it was incumbent upon the propounders of this alleged will of this unlettered person, to offer testimony tending to prove that she knew its contents; and the trial court charged the jury that it was necessary for them to find that she did know its contents (Record, Charge to the Jury, pp. 32 and 33). If, in order to prove this requisite knowledge of its

contents, the propounders (appellees) had offered a witness who would testify that after making the alleged will she had declared to such witness how, or the manner in which, she had devised her property by her will, and such declaration so made by her was in effect the same as the provisions of the alleged will, can there be any doubt but that such testimony would be admissible as tending to prove that she knew the contents of the will? If such be the rule of evidence, then it is hard to understand upon what principle a declaration by this unlettered person to the effect that she understood the contents of this alleged will to be different from what it really was, should be excluded. The rule of evidence applicable to the proof of wills of unlettered persons is an exception to the general rule, and may be termed to be a law unto itself. The general rule against impeaching a written instrument by oral declarations or testimony does not apply. The same rule of evidence applies in the case of an unlettered person, to declarations by the alleged testator made immediately before the execution of a will, in order to prove or disprove the fact that he or she was acquainted or was not acquainted with the contents of the alleged will.

The above rule of evidence, we respectfully submit, is sustained by the extracts of authorities contained in the following pages of this brief. We also attach in an appendix at the end of this brief, the syllabi of additional cases sustaining this rule.

The Alleged Will.

The inconsistent provisions of the said paper-writing itself furnishes another reason why the strict requirement as to proof of the wills of illiterate persons should be carefully adhered to in this case. The paper-writing was framed in such a way that an illiterate person might easily be deceived as to what its provisions really meant. In fact, its provisions are such as to be irreconcilable. The paper-writing first divides her property among her five children, naming them.

Then it makes specific devises of the same property which cuts out three of her children first mentioned; and then directs the sale of one lot without directing the distribution of the proceeds to anyone. Other glaring inconsistencies will appear by a close examination of the paper-writing (Record, pp. 1 and 2).

AUTHORITIES.

Authorities sustaining the contention that *declarations* of Illiterate Testators are admissible in evidence.

Below are given some of the authorities which directly hold that when you have once laid the foundation, by proving that the alleged testator was illiterate, and could not read or write or sign his name, or from any other cause it was doubtful whether he knew the contents of the will, that then the declarations of the alleged testator are admissible in evidence to show whether he knew or did not know, the contents and provisions of the alleged will.

In Harleston *vs.* Corbett, 12 Rich. (S. C.), 604, it is directly held that having first laid the foundation by showing that the testator was blind and unable to read the will, his declarations are admissible to show whether he knew the contents of the will.

In Watterson *vs.* Watterson, 38 Tenn. (1 Head), 1, the court (Justice Caruthers) says, that one of the grounds of contest is "the *illiteracy* of the testatrix" (on page 2 of the opinion), and *"that the declarations of the testatrix at the time, and previous to the execution of the will, was competent testimony to show knowledge of contents."*

In the case of Cox *vs.* Cox, 4 Sneed (Tenn.), 81, McKinney, J., in delivering the opinion of the court, at page 85, says:

> "The proof shows that the testatrix, at the time of making the will (25th February, 1854,) was seventy-three years of age, and that *she was illiterate, not being able to read or write. No question is raised, however, as to her mental capacity to make a valid will, nor is there any imputation of actual fraud,* in procuring the will to be made.
>
> "The draftsman of the will, who is a subscribing witness, proves that he wrote the will at the request of the testatrix; that she dictated the will, and that it was written according to her direction; and that, after he had finished it, he 'read it to her twice', and that 'she fully understood and comprehended the will'. The other attesting witness appears to have been called in after the writing of the paper was finished. He merely saw the testatrix (86th page of the report) 'make her mark', and, with the other witness, attested the will in her presence."

It was contended by counsel that the will should have been read over to the testatrix in the presence of both witnesses, which position, it is conceded by the appellants in the case at bar, was properly not sustained by the court. But the object of this citation is to show that the court held, as quoted below, that the fact as to how the testatrix understood the will may be established, as regards the measure and kind of evidence, as any other disputed matter of fact. The court, at page 88, says:

> *"The existence of the fact that the testator cannot read, the law regards as a circumstance not only as sufficient to excite suspicion, but to compel the presumption of knowledge of the contents of the will.* It may be of more or less force, according to the facts of each particular case; and the degree of proof requisite to remove such suspicion, and to establish the knowledge of the testator, must necessarily depend

upon the circumstances of each case. All that in reason can be necessary is that it shall appear to be made to the entire satisfaction of the jury that the testator fully understood and assented to the provisions of the will. *And this—like every other fact as to which the law has ordained no arbitrary, technical rule respecting the species or measure of proof —may be established either by positive proof, or by circumstances of a nature to convince the mind of its truth. In other words, it may be established just in the same way, as regards the measure and kind of evidence, as any other disputed matter of fact.*

"We hold, therefore, that the testimony of one withness, of undoubted credit, to the fact of the testator's knowledge of the contents of the will is sufficient to warrant a jury to pronounce in favor of the will."

Rollwagen *vs.* Rollwagen, 63 N. Y., p. 504, Earl, J., delivered the opinion of the court, and at top of page 515, says: "After the codicil was executed, so far as is disclosed in the evidence, the decedent never spoke of either the will or codicil to anyone except Harry Herrman. *He testified that decedent informed him that he had made a codicil to provide for the child which was then expected to be born of Mrs. Rollwagen,* and which was subsequently born on the twenty-seventh day of November, and is still living."

Selden *vs.* Myers, 20 How., 506. This was the case of a deed made by a person who could not read or write or sign his name.

Chief Justice Taney, in delivering the opinion of the court, says, in at the middle of page 509:

"Testimony was taken on both sides. On the part of Selden witnesses were examined, who state that, from conversations between Selden and Myers, at which they were present, about the time when the note and deed were executed, or shortly before the advertisement for the sale, they understood that Selden owed nothing to Myers & Company when

they were given, and that they intended to secure future supplies which Myers & Company were to furnish. But *none of these witnesses were present when they were executed,* and none of them knew whether they were or were not read and explained to the parties before they were signed. And certainly, parol testimony is altogether inadmissible to show that the contract was different from the one reduced to writing unless it can also be shown that the party was fraudulently deceived and misled as to the contents of the written instruments.

"It is true that Selden is an unlettered man, and can neither read nor write. *He makes his mark to the instrument he executed; and dealing with such a person, it is incumbent on Myers & Company to show, past doubt, that he fully understood the object and import of the writings upon which they are proceeding to charge him; and if they failed to do so, the above-mentioned testimony offered by the appellant, as to the state of the accounts between them at the time, would have furnished strong grounds for inferring that he had been deceived, and had not understood the meaning of the written instruments he signed.*"

The case of Adams *vs.* Norris, 64 U. S., 353, was the case of a will by an American made in Mexican territory and translated into the Spanish language by other persons before the testator executed it. Witnesses were produced who testified that the testator, Grimes, who was dead, "shortly before his death, had informed the witness that he had devised his place of del Paso, with the stock on it, to Hiram Grimes, his nephew, and desired of him some aid for his nephew in the settlement of his affairs. No other testimony is reported in the bill of exceptions." Mr. Justice Campbell, in delivering the opinion of the court, as the last paragraph of his opinion says: "The binding force and legal operation of this codicil are to be determined by the law, as it existed when the codicil was made. But the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon

the law of the forum at the time of the trial. The evidence of the signatures of the testator and witnesses was competent; and it was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by the law were complied with. *As supplementary proof that the testator had made the codicil, and was acquainted with the contents of the instrument, the admission or declaration offered as evidence was competent testimony.*"

Proof of Will Required by Law in the Case of Illiterate Testators.

While we concede that the presumption of law is that where a man of *intelligence* executes his will with due formalities, he knows its contents, we insist that the rule is settled that where a testator

the language of the paper which is offered as his will agrees in substance with the instructions given by the testator.

"If, however, it appears from the evidence that mental capacity was not perfect, that the testator was blind, *illiterate*, or weak minded, that he did not understand the language in which the will was written, or if circumstances are shown from which alone or in connection with others the court may reasonably infer the existence of undue influence, the presumption that the testator was acquainted with the contents of the instrument is overcome. *A more satisfactory degree of proof is then required.* The court can not infer that the testator was acquainted with the contents of the will merely from the fact of its due execution. But even in the case of a blind testator, it need not be shown that the will was actually read over to him prior to its execution. But in *every* case of doubt the burden of proof is upon the proponent to show, by said evidence, which will satisfy the court, that the testator has been fully acquainted with the contents of the instrument which purports to be his will."

The author then quotes, with approval, the language of the court in Day *vs.* Day, 3 N. J. Eq., 549, at page 552:

"In this case it is without question that the testator did not read the will himself. It was not in his possession so as to afford him an opportunity; and, if it had been, he was so weak and low as to be unable to do it. It is also clear that it was not read over to him. It must then be shown to the satisfaction of the court that he was in some other way made familiar with the contents of the instrument and approved them. In this case the presumption of law fails, and it becomes the duty of the person offering the will to show that the contents of the paper were fully made known to the testator. So, *if the testator is incapable of reading the will*, whether the incapacity arises from blindness, sickness or any other cause, *the rule is the same and the burden of proof is thrown on the person offering the will.*"

In Schouler on Wills (3d Ed.), Sec. 317, the author says:

> "The civil law required that the written will of a blind person should be read over to him and approved by him in the presence of subscribing witnesses. Our common law lays down no such imperative rule, but with regard to both blind and *illiterate*, and *all who can not read what is written out as their will*, requires satisfactory proof of some kind to the effect that the testator knew and approved of the contents of the will which was executed as his own. Such a will may be read over to the testator before signing, apart from his witnesses, or it may be shown that the contents were correctly made known to him without any reading of it at all, provided it appears on the whole that the instrument as drawn up and executed constituted his testamentary disposition as intended by him. *Less than this, however, is unacceptable*, and where the will, without being read over or examined, is signed by the testator upon an assurance that it has been prepared according to his instructions, when in point of fact it has not been, probate should be refused. Corresponding considerations may apply to the wills of those who are deaf, but not blind; and a testator of this latter description would fitly assure himself that the instrument is correct by reading it over instead of having it read to him; and here, once more, the controlling question would be whether the instrument in question embraced his testamentary intentions."

In Williams on Executors, Vol. 1 (7th Am. Ed.), p. 414, the author says:

> "Where the testator is blind it must be proved that the contents of the will were known to the deceased, for his execution, or other acknowledgment of the will, is not sufficient, and the same, *where from want of education*, or from bodily affliction, he is unable to read."

Again, in Jarman on Wills (6th Am. Ed., by Bigelow), vol. 1, at page 47, the author, in discussing the capacity of a blind person to make a will, says:

> "Indeed, it has even been held that a will need not be read over to a blind testator previously to its execution, provided there be proof aliunde of *a clear knowledge* of the contents of the instrument, but it is almost superfluous to observe that in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised."

Bigelow's notes at the foot of the same page are as follows:

> "In a case of mere blindness, with no allegation of fraud, undue influence, or the like, the court will grant probate of the will upon satisfactory evidence that the testator knew and approved of the contents of the instrument. In re Axford, 1 Swab & T., 540. The evidence naturally expected in such a case is that of the reading over the contents to the testator, perhaps in the presence of those who witness the will. Fincham *vs.* Edwards, 3 Curteis, 63; Neir *vs.* Fitzgerald, 2 Brodf, 42. But other evidence showing that he was acquainted with the contents may be received. Idem: Barton *vs.* Robins, 3 Phillim., 455n; Harrison *vs.* Rowan, 3 Wash. C. C., 580, 583; Clifton *vs.* Murray, 7 Ga., 564; Wampler *vs.* Wampler, 9 Md., 540 (where the will was read to the testator, but not before the attesting witnesses); Longchamp *vs.* Goodfellow, 2 Bos. & P. N. R. 415 (to the same effect); Martin *vs.* Mitchell, 28 Ga., 382 (the same); Davis *vs.* Rogers, 1 Houst., 44. See, further, Lewis *vs.* Lewis, 6 Sergt. & R., 489; Worthington *vs.* Klemm, 144 Mass., 167.
>
> "*The case of one who can not read* appears to stand upon similar footing. It should be shown that he was aware of the contents of the will; but it is not neces-

sary that the will should be read over to him if the fact of the testator's knowledge can be *otherwise clearly shown.*"

Attention is also called to the following cases:

Harleston *vs.* Corbett, 12 Rich. (S. C.), 604.

Declaration of a blind man, made after the execution of his will, may be given in evidence to show that he knew the contents of the will when he executed it.

Johnstone, J., says, at page 608:

> "The principle, in the case of a blind testator, is, that proof is competent to show that he was aware of what his will contained, when he executed it. The mode of his having become cognizant of its contents is not restricted; any proof, which satisfactorily shows this, is competent."

Lake *vs.* Ranney, 33 Barb., 49, where it is held that: It is not absolutely necessary to show that the testator gave instructions for the drawing, or that it was read to him, but there must be some affirmative evidence that the testator knew the contents of the will and that it expressed his real intentions.

The court (Justice Allen), at p. 67, says:

> "In ordinary cases it is sufficient for the individual offering a will to prove a compliance with the formalities prescribed by statute; but when circumstances of suspicion exist, more is required, and proof should be given to satisfy the tribunal that is called to pronounce upon it, that the paper offered is, in truth, the will of the testator declaring his intentions. There should be some affirmative evidence that the testator knew the contents of the will, and that it expressed his real intentions—that his mind went with the will.
>
> "The proof most usually given, because the most accessible, is of instructions for the preparation of

> the will, and of previously declared intentions consistent with the will, together with evidence of the reasonableness of its provisions. But there is no line of evidence prescribed, and any evidence is competent, as well as sufficient, which satisfies a court or jury that the will was in truth executed by the testator with full knowledge of its contents, and voluntarily executed without restraint, coercion, or undue influence of any kind."

In re Murphy's Will, 37 N. Y. Supp., 223:

Where it is shown that the draftsman read the will to testatrix, who could not read or write, and that she stated that it was "all right," and that she understood its contents and approved of it; in such case the court will assume that the will was read correctly.

In this case, Judge Lansing says (p. 224):

> "It is claimed on the part of the contestants that the will was not properly published by the deceased, and also that the deceased was not advised of the contents of the will prior to its execution. There is no claim made that she was not a woman of fair intelligence and of sound mind, but it is claimed that, since she could neither read nor write, it was necessary for the due execution of this instrument to show that it was read to her, or at least that she understood its contents. This is undoubtedly the law (In re Lansing's Will, 2 N. Y. Supp., 117)."

Harding *vs.* Harding, 18 Pa. St. (6 Harris), 340, where it is held:

The execution of the will being proved by two witnesses, whether it was signed by the testator or by another person at his request, it need not be proved in addition that it was read to him, *unless it was shown that he was incapable of reading, or its execution was otherwise impeached.*

Watterson *vs.* Watterson, 38 Tenn. (1 Head), 1, where it is held:

Though in the case of illiterate testators, and where the writer of the will is the chief legatee, the knowledge required as to the contents of the will may be proved to the satisfaction of the jury in the same way as any other fact, yet in a case like this, the fact of knowledge should be made out by proof strong and convincing, equivalent at least to reading the will or hearing it correctly read.

In this last cited case of Watterson *vs.* Watterson, the court (Justice Caruthers) said, p. 2:

> "There is no direct evidence that the paper was ever read to her, and the first question is whether that is indispensable in the case of illiterate persons. The circuit judge charged that it was not, but it was enough for the jury to be satisfied that she understood the contents no matter by what means. It was not necessary, he said, for the plaintiff to show by the evidence that the will was read to the testatrix before she signed it; all the law requires in such cases is, that the jury should be satisfied from the proof that the testatrix, at the time of the execution of the will, fully understood its contents; that this knowledge might be made out by positive or circumstantial testimony; *that the declarations of the testratrix at the time, and previous to the execution of the will, was competent testimony to show knowledge of contents.*"
>
> "There are two grounds in this case to excite suspicion and distrust: (1) the illiteracy of the testatrix, and (2) the fact that the paper was written entirely by the principal legatee.
>
> "The general rule that the free and voluntary execution of a paper by any one in his right mind will be sufficient, prima facie, to establish a knowledge of its contents, does not apply to a case in either of these categories, much less to one that falls into both; or rather, these cases are exceptions to the general rule. In such cases the presumption of knowledge does not arise, and the burden of proving it lies upon the propounders.

"But the particular question raised upon the charge in the argument is whether any other means of knowing the contents of the paper, but by hearing it read, will be sufficient in the case of an illiterate person. His honor held that knowledge was sufficient no matter by what means acquired; that reading was not the indispensable and only mode. In this case the only proof before the jury on the point in question was that she said at the time the paper was witnessed by the Larkins that she knew what it contained, and assigned reasons for not permitting it to be read. She did not say that she had ever heard it read, but only that she knew its contents. How she obtained this knowledge is nowhere disclosed. Whether it was derived from her son, the draftsman and beneficiary, or from some other purer or more reliable source is not disclosed. *The jury should have been told that such information as that would not be enough to establish the fact*, and if she relied upon that alone for the knowledge she professed to have of the contents, it was not sufficient."

"It is not contended that direct proof that the paper was read to her is necessary, but that the jury should have been instructed that the proof must satisfy them that such was the fact."

New trial granted, the verdict being in favor of the will.

It has also been held in Taylor *vs.* Cresswell, 45 Md., 422, by the Court of Appeals of Maryland that:

It is absolutely requisite that the person making a will should know and appreciate its contents, otherwise it is not his will.

Wisener *vs.* Maupin, 61 Tenn. (2Baxt.), 342, where it is held:

When the testator was aged, illiterate, and diseased, full and satisfactory proof will be required that he knew the contents of the will.

Keys *vs.* Halloway, 66 Tenn. (7 Baxt.), 575, where it is held:

On a will contest *evidence furnishing more than ordinary*

assurance that testator knew of the contents of his will is necessary where it is shown that he was very aged, imbecile, and *illiterate*, and that he was surrounded by interested parties.

Tucker *vs.* Calvert, 6 Call (Va.), p. 90, where it was held:

If the testator make his will, and a codicil be afterwards prepared by another person who presents it to him for signature, it should be proved that the testator read it himself, or that the whole of it was read to him before he signed it.

This next above cited case (Tucker *vs.* Calvert) was cited as the authority to sustain the decision in Guthrie *vs.* Price, 23 Ark., 407, which last mentioned case is cited in the brief of appellees. But it will be seen that the folowing opinions of Carrington, Judge, and Lyons, President, delivered in the case of Tucker *vs.* Calvert, fully sustain the position of the appellants in the case at bar. Carrington, Judge, in the case of Tucker *vs.* Calvert, 6 Call, p. 98, says:

> "Every testator, before he executes his will, ought to be perfectly acquainted with its contents, either by having written it, or by reading it over himself, or by its being faithfully read to him by another. By which, I do not mean to say, that, in every case, it is necessary, that the witnesses should prove one of these three things to have been done; for, in general, it is enough that the witnesses are able to prove that the testator was in his senses, at the time of executing it, because it will *prima facie* be presumed, that a man in his senses made himself acquainted with its contents before he published it as his last will. But, if there be any reasonable grounds to doubt the testator's knowledge of its contents, those who would prove the will should be able to show that its provisions were known to him at the time of its execution. In the present case, the proof of the testator's knowledge, or assent, is very defective, although there are several grounds to conclude that he was not acquainted with the whole contents of this codicil.

> The subscribing witnesses prove that John Calvert called on them to attend him to the house of the testator to attest a paper, drawn up by himself, and to be executed by the testator as a codicil to his will. That he expressed himself to be deeply interested in having it done. That they found the testator *in extremis*, and so far gone, that, although in his senses, he was not able to read, but was supported when he signed it, and that he died the next day. These circumstances are suspicious. That a paper should be prepared by an interested person in the absence of the testator, and brought to him to be executed at a time when he was under certainly great bodily, if not mental debility, is so singular that it calls for an explanation, which I think it has not received. It was attempted to be shown that the paper was read to him by John Calvert; but whether all, or only a part of it, was read, the witnesses are unable to say, having never read it themselves. Mrs. Ingram, a non-subscribing witness, remembers that on the day before, she heard John Calvert read a paper to the testator, which had a revoking clause in it, but the subscribing witnesses remember no such thing. The proof of the testator's knowledge, therefore, is very inadequate; and, upon the whole, I am for reversing the judgment of the district court, and affirming that of the hustings court."

Lyons, President, in the same case of Tucker *vs.* Calvert, 6 Call, at p. 100, says:

> "None of the parties concerned were, perhaps, guilty of fraud; but the rules of law must be observed, and care taken not to open a door to surprise upon testators. The testator should either write, or read the will himself, or it should be read to him by some other person, or there can be no assent of his mind to the contents, and the opportunities for deception will be very frequent: Nothing would be so easy as to obtrude a will upon a man worn down with the weight of years, or languishing upon his death bed. In the present case, it is not proved either that the testator wrote the codicil; that he read it himself;

or that it was read to him. Indeed, the proof is the other way: For John Calvert, the party interested, prepared it; and although he affected to read it, yet there is no proof that he read the whole of it, and there was no opportunity afforded the friends of the deceased of consulting the testator, and knowing whether it fairly expressed his intentions or not; for John Calvert carried it off immediately, and refused to let anybody see it. Under these circumstances, it is impossible to say, that there was that free and full assent of the mind to every part of this paper which the law calls for; and for which the infirmities of human nature and the snares to which old age, or sickness, may be exposed, render it proper that the court should require to be proved. The hustings court were well acquainted with the parties and the witnesses, and the question was examined by them soon after the transaction. They rejected it, and I see no reason to differ from them in opinion. I therefore concur that the paper is not to be proved as a codicil to the testator's will, but that it is to be rejected altogether. Of course, the judgment of the district court is to be reversed, and that of the hustings court affirmed."

Rollwagen *vs.* Rollwagen, 63 N. Y., 517, where it is held:

A party offering an instrument for probate as a will must show satisfactorily that it speaks the language and contains the will of the testator.

Although ordinarily the subscription and execution of a will in the mode prescribed by law are sufficient proof upon these points, yet, where the testator can neither read, write, nor speak, there must be not only proof of the factum of the will, but that the mind of the testator accompanied the act; that he knew and understood the contents of the instrument and that it expressed his will.

Weir *vs.* Fitzgerald, 2 Bradf. (N. Y.), 42, where it is held:

The law does not prohibit deaf, dumb, or blind persons

from making a will. Defects of the senses do not incapacitate if the testator possesses sufficient mind to perform a valid testamentary act.

The statute does not require a will to be read to the testator in presence of witnesses, though it is proper to do so when the testator is blind or can not read.

Besides mere formal proof of execution, something more is necessary to establish the validity of a will when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference can not be drawn from the formal execution. Additional evidence is required that his mind accompanied the will, and that he was cognizant of its provisions. This may be established by the subscribing witnesses, or by evidence aliunde.

In Burritt *vs.* Selliman, 16 Barb., 198, it is held:

Where there is no evidence that the testatrix had anything to do with the preparation of the instrument purporting to be her will, or that she ever read it or heard it read, or that its contents were ever even stated to her, *proof that she knew what was in the paper she signed is imperiously demanded before the same can be admitted to probate*, especially where it affirmatively appears that the mental faculties of the testatrix had become seriously impaired by the use of strong drink and opiates.

In Van Pelt *vs.* Van Pelt, 30 Barb., 134, it is held:

Where the testator is unable to read or write, is extremely ignorant, is weak of understanding, and is susceptible to influence, or the victim of passion or prejudice, a simple compliance with the statutory forms of execution will not be sufficient to render the will valid.

The burden of proof is shifted in such a case. The party propounding the will is bound to show not only that the formal acts required by the statute in all cases were performed, but that the testator's mind accompanied the will;

that he knew what he was executing and was cognizant of the provisions of the testament.

Price *vs.* Price, 12 Eng. L. & Eq., 144, is to the effect that: An illiterate person who could not write signed an instrument purporting to grant all his property to his wife as her sole and absolute property, and shortly afterward died. On a suit instituted by the wife to have the husband's heir declared a trustee for her.

Held, that it was incumbent on the plaintiff to show that the grantor understood the nature of the instrument, and as the evidence merely showed that the instrument had been read over to the grantor by an unprofessional person who had prepared it, and as to whose capacity to explain it there was no evidence except such as rendered such capacity very doubtful, the will was dismissed.

This general principal, viz., that where an unlettered person signs an instrument, it must appear that he understood the object and import of the instrument which he signs was recognized by the Supreme Court of the United States in Selden *vs.* Myers, 20 Howard (61 U. S.), 506, in which it was held that: (1) Parol testimony is inadmissible to show that a contract was different from the one reduced to writing, unless it can also be shown that the party was fraudulently deceived and misled as to the contents of the written instrument; (2) Where one is dealing with an unlettered man, who can neither read nor write and makes his mark to the instrument he executed, it is incumbent on the former to show, past doubt, that the latter fully understood the object and import of the writings which he executed.

———o———

We respectfully submit that the extracts of the law from the text writers and the cases cited in this brief show conclusively that in a case like that at bar, where the testatrix is old and illiterate and unable to read or write or to sign

her own name, and where it appears from the evidence, as it does in this case, that neither at the time of the execution of the alleged will, nor at any other time, was the same read over to the testatrix or she made aware of the contents thereof, and there is no evidence to show by whom the will was written, or who wrote the name "Loraine Lipphard" at the foot thereof, and, further, where it appears from the evidence, as in this case, that the witnesses to the will do not know how many pages there were to the will, whether or not it had a back, whether or not it was hinged together, and can not identify the first two sheets as parts of the paper which they witnessed; and, further, that the alleged will was produced after Mrs. Lipphard's death by the party named as executor there, who filed same in court by his counsel without the knowledge of the husband of testatrix, from whom in all their married life she had never concealed anything, mere proof of the formal execution of such a paper by the proponents thereof, as in this case, is not sufficient. Before such a paper can be admitted to probate, we submit that it further devolved upon the proponents thereof to show that the alleged testatrix, Loraine Lipphard, was made aware of the contents of the instrument which she is alleged to have signed as her will. No such evidence was produced at the trial below, and the motion of the caveators to direct a verdict for them, because of the absence of such evidence, was overruled by the court and exception duly taken. This, we submit, was error for which a new trial should be granted.

II.

The evidence which the caveators offered to produce tending to show that the alleged testatrix did not know the contents of the instrument alleged to be her will, is competent and should have been admitted, as shown by the above-cited cases in the first part of this brief.

This was excluded by the court below on the supposed

authority of the case of Throckmorton *vs.* Holt, 180 U. S., 552, which case, it was claimed, was contrary to the principles of law laid down in the cases cited in the first part of this brief. But it is respectfully submitted that this case (Throckmorton *vs.* Holt) is wholly misunderstood if it is sought thereby to establish the rule that declarations of the testator made prior to and after the execution of the will are inadmissible for any purpose, or are inadmissible in a case like the one at bar. The Supreme Court of the United States neither in that case nor in any other case laid down any such rule, but, on the contrary, has clearly indicated in that case *under what circumstances* such declarations are admissible. Let us examine that case and ascertain wherein the question then under consideration by the court differed from the questions under consideration in the case at bar.

There was *no question of illiteracy, mental capacity or incapacity* or of *undue influence* involved in the Holt case. The testator in the Holt case was a man distinguished for his learning, and of strong mental qualities.

This comparison discloses the fact that the questions in these two cases are totally different in most important particulars. In the Holt case the chief issues were *forgery* and *revocation*, which are entirely absent in the case at bar, while the case at bar contains the issues of *illiteracy, mental* or *testamentary capacity* to make a will and of *undue influence* which were not present in the Holt case. The decision of the Supreme Court in the Holt case was that the declarations of a deceased testator are not admissible under the issues of *forgery* and *revocation*, but the court expressly recognizes the rule that such declarations of testator are admissible under the issues of *mental capacity* and *undue influence*. Let us quote from the Holt case, p. 571:

> "The question is, in other words, can the contestants prove by unsworn oral declarations and by letters of the deceased, facts from which an inference is sought to be drawn that the disposition of

the property as made in the paper is improbable, and that the paper was, therefore, a forgery?

"The decisions of the State courts as to the admissibility of this kind of evidence are not in accord. Many of them are cited in the margin. Those included in class A favor the exclusion of such evidence, while those in class B favor its admission. . . . In the cases contained in class A, it is held that declarations, either oral or written, made by a testator, either before or after the date of the alleged will, unless made near enough to the time of its execution to become a part of the *res gestæ*, are not admissible as evidence in favor of or against the validity of the will. *The exception to the rule as admitted by these cases* is that where the issue involves the *testamentary capacity* of the testator, and also when questions of undue influence over a weakened mind are the subject of inquiry, declarations of the testator made before or after, and yet so near to the time of, the execution of the will as to permit of the inference that the same state of mind existed when the will was made, are admissible for the purpose of supporting or disproving the mental capacity of the testator to make a will at the time of the execution of the instrument propounded as such. These declarations are to be admitted, not in any manner as proof of the truth of the statements declared, but only for the purpose of showing thereby what in fact was the mental condition, or, in other words, the mental capacity, of the testator at the time when the instrument in question was executed.

"The cases contained in class B favor generally the admission of declarations of the deceased made under similar conditions in which declarations are excluded by the cases in class A."

The court then proceeds to discuss the question as to the admissibility of the declarations of the testator upon the issue of forgery, both prior to and after the execution of the will, and continues, p. 573:

"After much reflection upon the subject, we are

inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded, necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestæ* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a *mental condition*, yet they are generally stated in cases where the *mental capacity* of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the questions as to mental capacity as those upon any other subject. *But if the matter in issue be not the mental capacity* of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

"When they are not a part of the *res gestæ*, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they can not be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, *when the mental or testamentary capacity of the deceased is not in issue.* When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an

issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity), but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterance of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent therefore that *declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable,* and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false can not be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations."

The Supreme Court (in the Holt case) then proceeds to comment upon certain well-considered cases cited in class A, and then proceeds in its opinion as follows:

"Thus it is said in Shailer *vs.* Bumstead, 99 Mass., 112, which is one of the cases cited in the margin in class A: 'Intention, purpose, mental peculiarity, and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence.'

"And so in Gibson *vs.* Gibson, 24 Mo., 227, the court said such declarations were admitted when it was proposed to show the condition of the testator's mind or to show the state of his affections, but never as a mere narrative of facts."

The Supreme Court also cites with approval in the Holt case, the case of Waterman *vs.* Whitney, 11 N. Y., 157. This last cited case sustains the position of the appellants in the case at bar. The surrogate of Broomé County made an order refusing to admit the will of Whitney to probate. An appeal from this order of the surrogate was taken to the circuit judge, who ordered issues framed to be tried by the circuit court. The issues were:

1. Was the instrument propounded by Thomas G. Waterman . . . and purporting to be the last will and testament of Joshua Whitney, deceased, . . . duly made and executed by said Joshua Whitney as his last will and testament.

2. Was the said Joshua Whitney, deceased, at the time of making and executing the said paper writing . . . purporting to be his last will and testament, of sound mind, and capable of making a valid disposition of his property, real and personal, by last will and testament.

3. Was there on the day of executing the said paper writing, purporting to be the last will and testament of Joshua Whitney, deceased, or *at any time previous*, any *undue influence*, fraud, *or deception* used or practiced, by any person or persons whatever, to cause or induce the said Joshua, deceased, to make or execute the said instrument. . . .

The similarity of the issues in this case to the issues in the case at bar will be noted.

The Circuit Court excluded from the jury all evidence of declarations made before and after the execution of the alleged will, as was done by the court below in the case at bar. On appeal to the Court of Appeals of New York, that court, in its opinion (through Selden, J.), divides evidence offered to show declarations of an alleged testator into three heads: 1. Declarations to show *revocation* of a will. 2. To show *fraud*, and 3. "To show *mental incapacity* of the testator, or that the will was procured by *undue influence*," and while holding that declarations of an alleged testator,

offered to prove *fraud* (such as forgery as in the Holt will case), were not competent for that purpose alone, yet the Court of Appeals *distinctly held that to prove mental incapacity or undue influence*, such *declarations made both before and after* the date of an alleged will, were entirely competent evidence, and reversed the lower court, granted a new trial and directed the admission of the evidence excluded by the lower court. The Court of Appeals of New York (through Selden, J.), on this point, say:

> "Questions of *mental competency* and *undue influence* belong, in this respect, to the same class, because, as is said by Jarman, in his work on wills, 'The amount of influence which will be sufficient to invalidate a will, must, of course, vary with the strength or weakness of the mind of the testator.' 1 Jarman on Wills, 36. So *mental strength and condition* of the testator is *directly in issue* in every case of alleged *undue influence*."

In the case of Barbour *vs.* Moore, 4 App. D. C., 535, upon the question of the evidence of declarations of the testator, it is held:

> 5. "In a case in which a will is assailed for want of testamentary capacity of the testator and the exercise of undue influence, the declarations of the testator are admissible to show his motive, feelings and designs; and an instruction to the jury in such a case that declarations made by the testator in regard to past transactions are to be considered solely as they might throw light upon his mental condition and not as proving or tending to prove the truth of such statements, is erroneous as tending to mislead the jury as to the way in which the declarations should be considered by them" (syllabus).

This Court, speaking through Chief Justice Alvey, in this case of Barbour *vs.* Moore, 4 App. D. C., at p. 548, say:

> "In controversies involving questions of testamentary capacity, it is competent, for the purpose of shedding light upon the *state* of mind of the testa-

tor, at a time of making the will, to produce evidence of the condition of his mind, both *before* and *after* the date of the will. The condition of mind may be established by proof of conversations, actions, or *declarations of the testator,* inconsistent with testamentary capacity."

See also case of Olmstead *vs.* Webb, 5 App. D. C., 30, as to evidence of undue influence.

In the case of Adams *vs.* Norris, 64 U. S., 353, Law Ed., Book 16, p. 539, similar *declarations* of testator to those proposed to be offered in this case as to *knowledge of contents,* were held admissible.

To the the same effect are—

Thompson *vs.* Updegraff, 3 W. Va., 629 (cited in the Holt case).

Couch *vs.* Eastman, 27 W. Va., 796 (cited in the Holt case).

Cranmer *vs.* Anderson, 11 W. Va., 582.

Jarretts *vs.* Jarretts, 11 W. Va., 584.

Mathews *vs.* Warner, 4 Ves., 186.

Pemberton *vs.* Pemberton, 13 Ves., 290.

Norris *vs.* Sheppard, 20 Pa. St., 275.

Neel *vs.* Potter, 40 Pa. St., 283.

Storrett *vs.* Douglass, 2 Yeates, 46.

Trumbull *vs.* Gibbons, 2 Zab., 140.

Crispell *vs.* Dubois, 4 Barb., 399.

Stewart's Exr's *vs.* Lispenard, 26 Wend., 261.

And in Davis' Appeal from Probate, 29 Conn., 399, on the trial of an appeal by the sisters from the probate of the will in which the appellants claimed that the testator was of unsound mind and that undue influence had been used by his brother upon him when enfeebled in mind to procure the will, it was held that evidence of a declaration of a testator, made a long time before he executed the will and before

his mind was enfeebled that none of his property should ever go to the family of his brother, was admissible.

In Rambler *vs.* Tyron, 7 Serg. & R., 90, in which a contest arose as to the validity of a will on the ground of incapacity of the testator, it was held that the declarations of the supposed testatrix made in the absence of his wife, the devisee, of the importunity used by his wife and his father-in-law to procure the will to be made, were admissible.

In Robinson's Ex'r *vs.* Hutchinson, 26 Vt., 38, it was held that the declarations of the testator made about the time of the execution of the will, tending to show importunity and undue influence, and also to show the state of mind of the testator, are admissible.

In Howell *vs.* Barden, 3 Dev., 442, evidence was offered "to prove declarations of the supposed testator made after the execution of the proposed will, tending to show that it was obtained by fraud and undue influence of the principal legatee." The evidence was rejected by the court below, but the appellate court held that the evidence was admissible.

In Tunnison *vs.* Tunnison, 4 Bradf., 138, it was held that—

> "where there is room for doubting the strength of the testator's capacity, and for suspecting improper influences brought to bear on his volition, his previous declarations as to his testamentary intentions may be received in evidence."

It will be observed, therefore, that upon the authority of the Holt case and the cases therein cited, and certain other well-considered cases which we have quoted, the rule of law is well settled that where the issue of mental or testamentary capacity is involved, and upon the question of undue influence, the declarations of the supposed testator are admissible. This issue was absent in the Holt case, but is present in the case at bar, being definitely and clearly presented by the third and fourth of the issues in this case.

We submit, therefore, that the court erred in excluding these declarations of the testatrix in the case at bar under the issue of mental capacity and undue influence, and that the same should have been received and were competent evidence thereunder to go to the jury.

But under the authorities cited above in both the first and second parts of this brief the declarations of the testatrix should certainly have been admitted to show that she did not know the contents of the will. But the court below refused to allow any testimony whatever as to the declarations of the supposed testatrix. This, we submit, was clearly error, and a new trial should be granted, as shown by the authorities cited under the next heading below.

Mental or Testamentary Capacity not Perfect in Cases of Either Blindness, Illiteracy or Weakmindedness.

Underhill on the Law of Wills, vol. 1, page 201, says:

> "If, however, it appears from the evidence that mental capacity was not perfect, that the testator was blind, *illiterate,* or weak minded, that he did not understand the language in which the will was written, or if circumstances are shown from which alone or in connection with others the court may reasonably infer the existence of undue influence, the presumption that the testator was acquainted with the contents of the instrument is overcome. *A more satisfactory degree of proof is then required.*"

Wills of illiterate persons are put in the same class as wills of blind persons (Jarman on Wills, 6th Ed., Vol. 1, p. 47, Bigelow's notes at foot of same page) and blind persons are classed by Jarman under the heading of "Insanity, Weakness of Mind, &c." (Jarman on Wills, 6th Ed., 1st Vol., p. 47.) A person who cannot read or write has a certain degree of testamentary incapacity. Wherever there is any want of testamentary capacity the law requires that the court should

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be satisfied that the testator understood the contents of the will. The best proof in the case of an illiterate person is that it was read over to him or explained to him. Under the authorities, however, the reading over is not absolutely necessary, and the declarations of the illiterate person showing that she understood, or that she did not understand the effect of the will, are admissible (Harleston *vs.* Corbett, 12 Rich., South Carolina, 604, *supra;* Watterson *vs.* Watterson, 38 Tenn., 1 Head., 1, *supra;* Burritt *vs.* Selliman, 16 Barb., 198, *supra;* Weir *vs.* Fitzgerald, 2 Bradf. (N. Y.), 42, *supra;* Jarman on Wills, star page 35; Adams *vs.* Norris, 64 U. S., 353, Law Ed. Book 16, p. 539, *supra*).

It will also be observed by a review of the bill of exceptions that no declarations of the alleged testatrix were admitted in evidence by the court upon the offer of the defendants (caveators) below, who are the appellants in this court. After qualifying each witness by preliminary examination showing him or her competent to testify to the declarations of the alleged testatrix the question was asked each witness: Question: "What did she say?" To this question, propounded to each of the witnesses, a general objection was interposed by the counsel for plaintiff below (caveatees), and in each and all cases the objection was sustained. It is, therefore, respectfully submitted that if the evidence offered was competent to prove any of the issues involved in the suit it was manifest error by the court below to exclude it. See objection to the testimony of Adolph F. Lipphard, the husband of testatrix, Record, p. 27; to Albert R. Humphrey's testimony, Record, p. 29; to William A. Lipphard's testimony, p. 29; and particularly to the testimony of Mrs. Sarah Lipphard and the objection thereto, at the bottom of p. 30 and top of p. 31 of the Record.

It is clear from the record in this case that the court below ruled out any and all testimony tending to prove that the alleged testatrix did not know the contents and provisions of

the alleged will. The following extract from the record (pp. 30 and 31) will illustrate:

> "Q. Did you have any conversation with Mrs. Lipphard [alleged testatrix] in reference to any will?
>
> A. Yes, sir; I did.
>
> Q. Where was that conversation?
>
> A. Right in her own home, in a little pantry adjoining between the two rooms. She was sick at the time.
>
> Q. When was that conversation?
>
> A. About eight or ten weeks before she died.
>
> Q. What was it about? You need not state what she said.
>
> A. It was about her will. I asked her if she had made a will.
>
> Mr. Leighton: I object.
>
> The Court: I think that is incompetent.
>
> Q. What did she say in reference to what was in her will, and what she had done with her property, if anything?"

Then follows a statement of counsel for caveators (appellants) showing the object for which the testimony is offered, namely, that the alleged testatrix "denied to the witness that she had left her property as and in the manner stated in the will;" then follows the ruling of the court sustaining the objection to the testimony and the exception by the appellants (Record, pp. 30 and 31).

The question which was excluded and such exclusion held to be error by the Court of Appeals of New York in Waterman *vs.* Whitney, *supra,* was as follows, quoting the language of Selden, J., at p. 159:

> "The defendants called one Emory as a witness, by whom they offered to prove that the testator, *after* the execution of the will, had stated to the witness how he had disposed of his property in his will, which was in a manner entirely different from the actual disposition of it by the will in question. This evidence

> was objected to; the [lower] court sustained the objection, and the defendant's counsel excepted. The defendants further offered to prove that deceased 'made similar declarations to others *from the time of the execution of the will, up to the time of his death.*' This was also objected to and excluded, and the defendants' counsel excepted."

The Court of Appeals of New York held this evidence to be competent to go to the jury and granted a new trial.

———o———

The general principles of law and rules of evidence are pliable and have to be applied and adapted to each case. (Cox *vs.* Cox, 14 Sneed, 81 Tennessee.) It is again submitted that under the facts and circumstances of the case at bar, there can be no doubt but that the declarations of the alleged testatrix were admissible in evidence to show that she did not know or understand the contents and provisions of the alleged will. If the facts in the case at bar had been that at the time of the execution of the alleged will, it had been carefully read over to her and explained by a competent person so that there could be no doubt in the mind of the court that Mrs. Loraine Lipphard understood the contents of the paper-writing as fully as an educated person who could read or write would understand it, so that the rule and not the exception to the rule as to the proof of wills should apply, then in such a case there might, perhaps, have been some reason for the court to exclude declarations made by the alleged testatrix at any other time. But that is not this case, as there was no evidence produced tending to show that Mrs. Lipphard was ever acquainted with the contents of the alleged will. The best evidence being wanting, it was the duty of the court below to admit the next best evidence to prove the issues in the case. Certainly such evidence as was offered was competent and would have aided the jury in arriving at

the truth much better than the unreliable and speculative inferences which they were otherwise compelled to draw, under the charge of the court below. (Record, p. 33.)

In conclusion, it is respectfully submitted that under the facts in this case, (1) the *burden of proof* was upon the caveatees (appellees) to show by a preponderance of the evidence, and by clear and positive proof, affirmatively, that the contents of the paper-writing were understood by the deceased; and this not having been done, under the ruling of the court below, it was (2) competent for the caveators (appellants) to show by evidence of the declarations of the alleged testatrix that she did not know or understand the contents of the said paper writing, supported by the other testimony as to her illiteracy and the other circumstances in the case. All declarations of the deceased of every nature, except those offered by the appellees, were excluded in evidence. After the court below had indicated that no such evidence of declarations would be admitted, it was unnecessary to call other witnesses who would testify only to similar declarations, the exceptions to the ruling of the court having been taken by the appellants and the point of law thus reserved for review.

It is, therefore, submitted that the judgment should be reversed and a new trial granted.

Respectfully submitted,

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Attorneys for the Appellants.

APPENDIX.

List of cases referred to on page 8 of the brief.

Day *vs.* Day, 3 N. J. Eq., 549.

Syllabus:

But where it appears affirmatively that the testator did not read the will himself, and that it was not read to him, it must then be shown to the satisfaction of the court that he was in some other way made acquainted with the contents of the instrument and approved them.

So if the testator be incapable of reading the will, whether the incapacity arise from blindness, sickness, or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will.

Lake *vs.* Ranney, 33 Barb., 49.

Syllabus: . . .

In ordinary cases it is sufficient for the individual offering a will for probate to prove a compliance with the formalities prescribed by statute; but when circumstances of suspicion exist, more is required, and proof should be given to satisfy the tribunal that is called to pronounce upon it that the paper offered is in truth the will of the testator, declaring his intentions.

There should be some affirmative evidence that the testator knew the contents of the will and that it expressed his real intentions—that his mind went with the will.

Harding *vs.* Harding, 18 Pa. St. (6 Harris), 340.

Syllabus: . . .

2. Where the execution of a will is proved by two witnesses, it need not be proved, in addition, that it was read to the testator, whether it was signed by him or by another person at his request; it not being shown that the testator was blind or otherwise incapable of reading, and its execution not being otherwise impeached.

Waterson *vs.* Waterson, 38 Tenn. (1 Head.), 1.

Syllabus:

The fact that an illiterate testator had knowledge of the contents of the paper propounded as his will must be shown by such testimony as is satisfactory to the jury; but it is not indispensable that it should appear that such knowledge was acquired from hearing the will read. In a case, however, where the testator could not write or read writing, and the draftsman of the will was the principal legatee, the jury, upon such a question, should be instructed that information acquired from the draftsman would not be sufficient. In all suspicious cases, the testimony as to the testator's knowledge should be clear and convincing; equivalent, at least, to having heard the will read by a disinterested and unimpeachable party.

Wisener *vs.* Maupin, 61 Tenn. (2 Baxt.), 342.

Syllabus: . . .

Where the will was not read to the testator, and he was illiterate, it must be shown that he knew its contents, and this may be shown by circumstances, and where the testator was old, illiterate and diseased, full and satisfactory proof that he knew the contents of the will is required.

Keys *vs.* Holloway, 66 Tenn. (7 Baxt.), 575.

Syllabus: . . .

When the testator is in extreme old age, imbecile in mind, surrounded by intrusted parties, incapable of reading or writing, something more than ordinary ground of assurance that he had knowledge of the contents of his will must be required.

Rollwagen *vs.* Rollwagen, 63 N. Y., 517.

Syllabus: . . .

Although, ordinarily, the subscription and execution of a will in the mode prescribed by law are sufficient proof upon

these points, yet, where the testator can neither read, write, nor speak, there must be not only proof of the factum of the will, but that the mind of the testator accompanied the act; that he knew and understood the contents of the instrument and that it expressed his will.

Weir *vs.* Fitzgerald, 2 Bradf. (N. Y.), 42.

Syllabus: . . .

The statute does not require a will to be read to the testator in presence of the witnesses, though it is proper to do so when the testator is blind or can not read.

Besides mere formal proof of execution, something more is necessary to establish the validity of a will, when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference can not be drawn from the formal execution. Additional evidence is required that his mind accompanied the will, and that he was cognizant of its provisions. This may be established by subscribing witnesses, or by evidence *aliunde*.

Burritt *vs.* Silliman, 16 Barb., 198.

Syllabus:

Where there is no evidence that the testatrix had anything to do with the preparation of the instrument purporting to be her will, or that she ever read it, or heard it read; or that its contents were ever even stated to her, proof that she knew what was in the paper she signed is imperiously demanded, before the same can be admitted to probate; especially, where it affirmatively appears that the mental faculties of the testatrix had become seriously impaired by the use of strong drink and opiates.

Van Pelt *vs.* Van Pelt, 30 Barb., 34.

Syllabus: . . .

Where the testator is unable to read or write, is extremely ignorant, is weak in understanding, and is susceptible to influence, or the victim of passion or prejudice, a simple com-

pliance with the statutory forms of execution will not be sufficient to render the will valid.

The burden of proof is shifted in such a case. The party propounding the will is bound to show, not only that the formal acts required by the statute, in all cases, were performed, but that the testator's mind accompanied the will; that he knew what he was executing, and was cognizant of the provisions of the testament.

Harrison *vs.* Rowan, 3 Wash. C. C. R., 580.

Syllabus: . . .

It is not necessary for the devisee to prove that the will was read to the testator in the presence of the witnesses. In general, this is to be presumed, but if the testator was blind, or incapable of reading; or if a reasonable ground be laid for believing it was not read to him; or that there was fraud in the transaction; it is necessary for the devisee to satisfy the jury that the will was so read, or that the contents were known to the testator.

To similar effect are the cases of—

Price *vs.* Price, 12 Eng. L. & Eq., 144.

Selden *vs.* Myers, 20 Howard (61 U. S.), 506; involving a contract of an illiterate person.

Billinghurst *vs.* Vickers, 1 Eng. Eccl. Rep., 67.

Tucker *vs.* Calvert, 6 Call (Va.), 90.

Durling *vs.* Loveland, 7 Eng. Eccl. Rep., 92.

Chandler *vs.* Ferris, 1 Harr. (Del.), 454.

Harris *vs.* Vanderveer's Exr., 21 N. J. Eq., 561.

Taylor *vs.* Creswell, 45 Md., 422.

Harleston *vs.* Corbett, 12 Rich. (S. C.), 604.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 188.

ADOLPHUS F. LIPPHARD ET AL., APPELLANTS,

vs.

IDA P. HUMPHREY ET AL., APPELLEES.

BRIEF FOR APPELLEES.

B. F. LEIGHTON,
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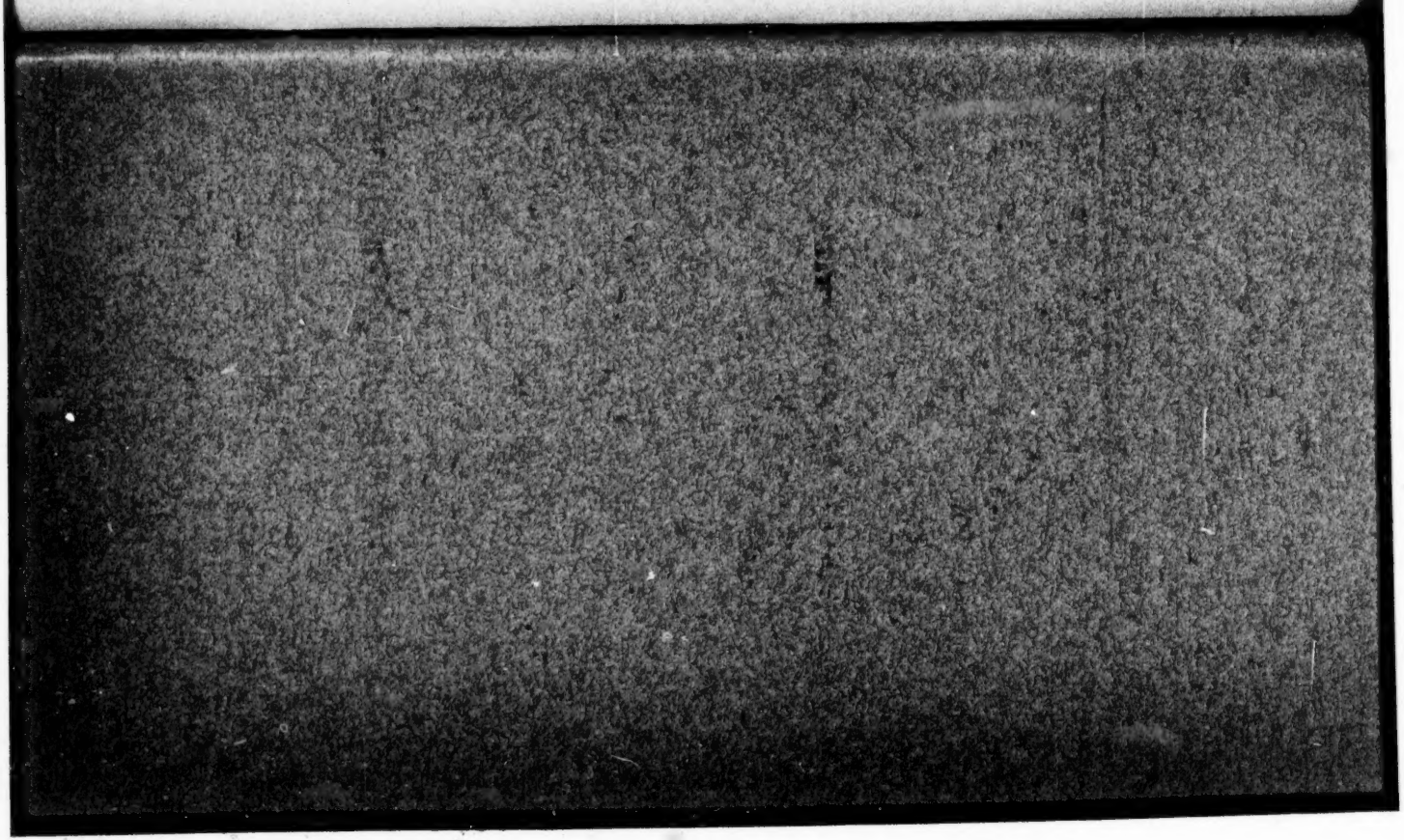

(20,509.)

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BRIEF FOR APPELLEES.

Statement of the Case.

On December 9, 1903, one Loraine Lipphard, for many years a resident of the District of Columbia, died. She left a paper writing purporting to be her last will and testament bearing date April 27, 1898. The Rev. Chastain C. Meador, since deceased, was named as the executor in the said will, and it was attested by three witnesses (Rec., pp. 1 and 2).

Decedent left surviving her as her next of kin and sole heirs at law her husband, Adolphus F. Lipphard, Sr. three sons, named John, William A., and Adolphus F. Lipphard, Jr., two daughters, named Sophia L. Hellen, nee Lipphard, and Capitola Lipphard Anderson, nee Lipphard, three grandchildren by Mary Lipphard Pyle, a deceased daughter, and nine grandchildren by Alice Lipphard Anderson, nee Lipphard, another deceased daughter. Four of said grandchildren, namely, Alice, Ida,

Capitola, and Helen Anderson were infants under the age of 21 years. All the other of her heirs and next of kin were of lawful age.

Decedent's property consisted of a small quantity of personal property valued at $350, and some real estate situated in this jurisdiction valued at $10,000 (Rec., pp. 1, 2, 3, and 4).

The husband, Adolphus F. Lipphard, Sr., and two of the sons, William A. and Adolphus F. Lipphard, Jr., filed a caveat to the probate of said will. All of the next of kin and heirs at law of decedent other than the caveators and John F. Lipphard, and the minor grandchildren, and one feeble-minded grandchild living in Philadelphia, waived citation and consented to the probate of the will (Rec., p. 5). Before the issues were framed on said caveat the Rev. Chastain C. Meador, the executor, under said writing, departed this life. Thereupon decedent's daughters, the said Capitola L. Anderson and Sophia L. Hellen, beneficiaries under said writing, petitioned the court for leave to propound said paper writing as and for the last will of decedent, and an order was passed by the court below authorizing this to be done (Rec., pp. 13, 14, and 15). Thereafter a decree was passed framing issues upon said caveat to be tried by a jury of said court. Said issues were five in number and were as follows:

1. Was the paper writing dated April 27, 1898, the last will and testament of said Loraine Lipphard?

2. Was the said writing executed and attested in due form, as required by law?

3. At the time of the execution of said paper writing, was the said Loraine Lipphard of sound and disposing mind and capable of making a valid deed or contract?

4. Was said writing procured by fraud or undue influence, practiced upon her by any person or persons?

5. Was the signature of the said Loraine Lipphard pro-

cured by force exercised upon her by any person or persons?

Thereafter Justice Stafford, holding the court below, apparently out of abundant caution, appointed Delmas C. Stutler, Esq., a member of this bar, guardian ad litem of the minor infants interested in decedent's estate to appear at the trial of the issues in said case (Rec., pp. 16 and 17).

The said Stutler filed a caveat on behalf of said infants (Rec., pp. 17, 18, and 19) and the same issues were sent to the jury as in the previous caveat (Rec., p. 20).

Justice Barnard presided at the trial of the issues in the court below and directed the jury to find the third, fourth, and fifth issues in favor of the caveatees, on the ground that the evidence adduced at said trial in support of said issues was insufficient to warrant the jury in finding a verdict in favor of the caveators thereon. The first and second issues were submitted to the jury with instructions by the court, who found said issues in favor of the will, and said will was by decree of the Supreme Court of the District of Columbia, sitting as a probate court, on the 3d day of May, 1906, admitted to probate and record. From this decree caveators appealed to the Court of Appeals of the District of Columbia, which affirmed the decree of the lower court, and from the decision of the Court of Appeals appellants took an appeal and sued out a writ of error to this court.

Before the trial of this case in the court below, John F. Lipphard, one of the testatrix's sons, conveyed, for the sum of $500, all of his interest in decedent's estate to his brother, William A. Lipphard, and died before the case came on for trial.

The paper writing in controversy was witnessed by three creditable witnesses, all of whom testified as witnesses for the caveatees. From their testimony it appears that on the 27th day of April, 1898, Mrs. Loraine

Lipphard came alone with the said paper writing to the office of C. H. Parker, a real estate broker, whose office is on Four-and-a-half street southwest, in this city; that she there found Miss Eva J. Parker, a daughter of Mr. Parker, and a clerk in his office, with whom she had long been acquainted. She produced said paper writing, told Miss Parker that it was her will, and that she wanted three witnesses to sign it. That two other witnesses were procured, and that all three being present in Mr. Parker's office, testatrix declared said paper writing to be her will, and made her mark thereto, in the presence of all the said witnesses, and they signed their names thereto as attesting witnesses, in her presence. That testatrix was, at the time, of sound mind, and capable of making a valid deed or contract. Witnesses did not recollect who signed Mrs. Lipphard's name to said paper, or whether said name was written while witnesses were present or not; but they testified that Mrs. Lipphard herself made her "cross" between her Christian and surname. The will was not read in the presence of said witnesses. After the said testatrix had subscribed her "cross-mark," and the will had been witnessed, it was handed to testatrix, who took it away with her (Rec., pp. 24, 25, and 26).

After the death of Mrs. Lipphard, the will was produced by Rev. C. C. Meador, the executor thereof and it was by him given to C. Clinton James, Esq., who lodged it in the office of the register of wills. The Rev. C. C. Meador had been decedent's pastor for more than forty years (Rec., p. 33).

From the testimony produced in said case by the caveators it appeared that the testatrix was a licensed midwife and had a great number of cases, but that she could not read or write; that the title to the real estate devised by said will was originally in Adolphus F. Lipphard, decedent's husband; that in March, 1857, he put a

ust upon said property, and it was subsequently sold
ereunder. He afterward took title again to the prop-
ty, and again it was sold. The title was then taken in
e wife's name. The money to pay for the same was
orrowed from a building association. Decedent was an
ergetic woman and a good wife. Part of the property,
hen purchased, was vacant land. In 1894 this land was
nproved by two houses. Testatrix made the contract
r the erection of said houses and attended to the build-
g of the same. Decedent's husband, by his own evi-
ence, is shown to be improvident and incapable of hold-
g property. Testatrix put all her property in trust and
rects that he shall have the beneficial enjoyment of it
uring his life, and that upon his death the expenses of
s last illness and funeral expenses shall be paid out of
er estate. Her personal estate was of little value. Her
al estate consisted of three houses. One of these she
ves to each of her two daughters; the other she directs
be sold by the trustee under her will and the pro-
eds to be equally divided among her three sons (Rec.,
p. 1 and 2).

The above is the substance of the facts established by
e evidence so far as is material to a discussion of the
ssignment of errors in appellant's brief.

Appellant discusses the five assignments of error in his
rief under two general heads :

First. That the court erred in submitting the first and
econd issues to the jury ; that the evidence was insuffi-
ent to support a verdict sustaining the will, on the
round that the jury ought not to be allowed to presume
om the evidence produced before them that the testa-
ix had knowledge of the contents of the will.

Second. In excluding evidence offered by the caveа-
ors of statements made by testatrix prior and subse-
uent to the date of her will as to how she intended to
ispose of her property. Of these in their order:

ARGUMENT.

First: The evidence shows that testatrix could not read. It further appears from the evidence that the will was not read to her at the time of its execution. Appellant seeks to maintain that from these two facts that the law raises the presumption that she did not know the contents of the will when she executed it. It is respectfully submitted that such is not law.

It is not shown by whom the will was prepared. The testatrix brought it with her to the office of one of the attesting witnesses for the purpose of execution. After its execution she took it away with her, and at her death it appears in the hands of Rev. C. C. Meador, the executor of the will, by whom it was propounded for probate and record. The executor died before the case was tried in the Supreme Court of the District of Columbia, and no explanation appears in the record as to how it came into his possession.

From the text of the will, it is evident that it was prepared by some one who had some knowledge of the law and of its requirements in the execution of wills. This is shown by the terms of the trust created by the will, the words of limitation employed therein, and the formal and usual attesting clause at its close. The will was in Mrs. Lipphard's possession before its execution, and she had ample opportunity to know its contents; she declared it was her will. Its provisions are such as she would naturally embody in a testamentary disposition of her property. It made provision for her husband and all of her children. She is shown to be a woman of intelligence and business capacity, although without the knowledge of the schools. There is no suggestion of fraud or undue influence in the case. She was in bodily and mental health and vigor when the instrument was executed. The jury found, as a matter of fact, that she did know the contents of the will at the time of its

execution. Did the court err in submitting the question to them?

The authorities are, that in the absence of fraud or undue influence, the illiterate maker of a will knows its contents. Affirmative proof of such knowledge, where the will is properly signed and executed, is not required. In the case of Vernon *vs.* Kirk, 30 Pa. St., 224, the testator could neither read nor write; the will was signed "E. N. for R. D.;" held to be a sufficient execution.

Said the court, in the course of its opinion:

> "When the execution had been proved, *the law raised the presumption affirmatively that she knew the contents.* The presumption is drawn from the ordinary conduct of mankind. Men do not commonly sign papers without knowledge of what is embraced within them; and this is true alike of *those who can read, and of those who can not.* Where fraud is practiced, or undue influence is *charged and proved*, affirmative proof of knowledge of the contents of a paper set up as a will may be necessary, but in no other case. The attempt of the plaintiff in error is to reverse this rule and change the burden of proof. Without giving any evidence of fraud practiced, or undue influence, she asks that the jury may be so instructed that they may find fraud and imposition, merely from the absence of proof that the paper was read to the testatrix—she having been unable to read. This can not be permitted. The cases in which affirmative proof of knowledge of contents has been held essential, after the execution of the paper has been shown, are, almost without exception, those in which such proof has been needed as an answer to a charge of imposition upon a testator. See Lewis *vs.* Lewis, 6 S. and R., 496. Here the court below, *instead of relying, as they might have done, upon the legal presumption which arose from proof of execution, submitted the matter to the jury*, with instructions that unless Rachel Dougherty did know

> the contents of the paper, and unless all its dispositions were hers, the whole instrument was void, and would not be her will. No more should have been asked, and no more could have been granted."

This case is on all fours with the one at bar.

In the case of King *vs.* Kinsey, 74 N. C., 261, the court said:

> "It is not necessary to the valid execution of the will of an illiterate person that the same shall be read over to him in the presence of the attesting witnesses. Upon proof of the actual execution the law presumes knowledge of the contents, and the onus of proving to the contrary falls upon the party alleging ignorance thereof."

In the case of Hoshauer *vs.* Hoshauer, 26 Pa. St., 404, it appeared that the testator did not understand English, and it was shown that the will was not read to him in the presence of the witnesses at the time of its execution. It was objected that there was no sufficient evidence to go to the jury to show that the testator knew the contents of the will. The court held that the presumption was the other way, and in the course of its opinion said:

> "If we had the whole transaction of the preparation and execution of the will before us in the evidence, and it then appeared doubtful whether it was read to him or not, this would be a different case. We must admit the presumptions that arise from the ordinary course of doing such business, and one of them is that a person signing any instrument and asking persons to attest it has taken care to understand its contents. His signing shows that he is giving expression to some purpose of his mind, and we must presume that he *knew that the writing contains that expression.* In executing wills and other instruments the witnesses seldom hear them read, because it is desired to save them this trouble or not to make the

> transaction unnecessarily public. When business is done in this ordinary way we must presume that no fraud or imposition has been practiced. *The evidence having shown that the will was executed according to the forms of law and without any fraud, it was right for the court to say 'there seems to be nothing in the way of a recovery by the plaintiff, and the verdict will be so taken,' because any other verdict would have been absurd, and counsel could not ask any other.*"

The facts in the case of Guthrie *vs.* Price was identical with those of the case at bar. In that case testatrix's name was subscribed to the will and between her Christian and surname was her mark in the form of a cross. The attesting witnesses signed the will at her request, in her presence, and in the presence of each other. She produced the paper writing for them to attest and declared that it was her will, and that she desired them to witness it as such. She did not write her name, but made her mark to the paper. It was not shown who did write her name to the will. It was not written by either of the witnesses nor in their presence. Testatrix could not read and the will was not read to her in the presence of or to the knowledge of the witnesses. The trial court instructed the jury, in effect, that notwithstanding the will was executed in accordanee with the formalities prescribed by the statute, *yet it being shown that the testatrix could not read the will was invalid, unless it was proven that it was read to her and that she was informed as to its contents.* After a careful review of the authorities, some of which are cited in appellant's brief, the Supreme Court of Arkansas held such instruction to be erroneous. Chief Justice English, in the concluding part of his opinion in this case, says:

> "It was proven that she could not read, and it was not shown that the will was read to her at the time it was executed, *but it may have been before.*

> She produced the will herself, declared it to be her will, asked the witnesses to attest it as such, and signed it by her mark. She was a woman of good sense, particular about her business transactions, and manifested her usual soundness of mind at the time. It is not shown that she was laboring under any feebleness of mind from disease or approaching dissolution. The provisions of her will appear to be reasonable. *It was erroneous for the court to tell the jury as a matter of law that it being shown that she could not read, it was necessary to prove that the will was read to her.* They had the right to infer from all the circumstances that she knew the contents of the will, though, as shown by the authorities above quoted, in *determining whether there was fraud or imposition in the execution of the will*, the fact that she could not read, and that the will was not read to her at the time she signed it, were circumstances to be considered by the jury" (23 Ark., 407).

In the case of Boyd *vs.* Cook, 3 Leigh., 32, a distinction was made by the court between the execution of a will *by a blind and illiterate person*, the court holding that in the case of a man who could see the signing of his will in the presence of witnesses, or acknowledging to them to be his will as signed, is proof that he was acquainted with its contents, but in the case of a blind man, although the formalities of the statutes be complied with, the jury or a probate court will, to rebut any imputation of fraud, require stronger evidence than the mere attestation of the signature, and this distinction seems to be well founded, for certainly a person in possession of all their natural faculties is better able to protect himself and less liable to imposition and overreaching than is a person who is deprived of his sight.

The facts in the case of Shanks *vs.* Christopher, 3 A. K. Marsh., 144, were identical with those of Guthrie *vs.* Price, and of the case at bar, with the single exception

that evidence was introduced showing that testator had made repeated statements declaring her purpose to dispose of her property as it was disposed of by his will. The court held that the execution of it by the testator with the solemnities required by the statute did of itself create a presumption of the knowledge of its contents, and that they conformed to his intention. That it was incumbent upon those who seek to avoid a will on the ground that it contains a disposition of the testator's estate of which he had no knowledge, to establish that fact by proof aliunde of the instrument.

One of the issues in the case of Pettes *vs.* Bingham, 10 N. H., 514, was as to whether or not the testator had knowledge of the contents of the will which he signed by mark, and the jury found that there was no evidence to show that he did not have knowledge. The court held that the presumption must be that the testator had knowledge of the contents of the will and that the will was entitled to probate and record.

In the case of Clifton *vs.* Murray, 7 Ga., 565, the will in controversy was that of a person old, infirm, and blind. It was not read by the testator at the time of its execution. The court held that the question after all was one of fraud, and that the question whether or not the testator had been imposed upon was one of fact to be left to the jury, and the circumstance of the will not having been read at the time of its execution should be weighed by the jury in considering their verdict. Judge Lampton, speaking for the court, said:

> "This case is narrowed down to a single point. When a testator is blind, or so illiterate as not to be able to read or write, is it indispensable to the validity of his will, that it be read to him, at the time of its execution, in the presence of the subscribing witnesses?
>
> "Swinburne intimates that it is He says that 'a blind man may make his testament in writing, provided the same be read over before witnesses, and

in their presence acknowledged by the testator for his will.'

"This may be the rule of the civil law; it would seem, however, never to have been adopted as that of the common law. For Lord Coke says: 'If the party who should deliver a deed, doth not require it to be read, he shall be bound by it, though he be blind or illiterate.' Thoroughgood's Cases, 2 Rep., 9; Shulter's Case, 12 Rep., 90. And Lord Coke goes so far as to hold that the deed is good, not only where it is presumed that it was read from the contrary not appearing, *but that it is good where the contrary doth actually appear. And there is, we apprehend, no distinction between wills and deeds in this particular.* It is, after all, *an issue of fraud, and the question as to whether or not the testator has been imposed on is one of fact to be left to the jury.* Now, it is admitted that the testator was sane, and it is not for us to conjecture how or in what manner he came to the possession of this knowledge. At any rate this evidence was most properly left to the jury, and they having found affirmatively, would the court be warranted in setting aside the verdict."

The judgment of the lower court admitting the will to probate and record was affirmed.

The case of Harrison *vs.* Rowan is to the same effect. The will in controversy in this case was assailed on the ground of fraud and want of testamentary capacity, and because the will was not read to the testator in the presence of the attesting witnesses. The court held that it was not necessary that the will should be read to the testator in the presence of the attesting witnesses, and said:

"It would be an unwise provision of the law to require this to be done, inasmuch as most men are careful to confine to their own breasts the manner in which they have disposed or mean to dispose of their property by will. The domestic peace

> and harmony of the testator's family might be very unhappily jeoparded if publicity were necessary to be given on such occasions."

The court further held that even in the case of a blind or illiterate person it was sufficient for the propounders of the will to show by evidence *satisfactory to the jury* that the testator knew the contents of the will.

3d Wash. C. C. R., 584.

The case of Doran *vs.* Mullen, 78 Ill., 342, is strongly in point. The validity of the will of Michael Mullen was the issue in the case. The will was written on a beer vessel in a beer saloon. It was dictated by a man named Wilder to the scrivener. Testator signed it by mark. It was attested by two subscribing witnesses, both of whom were present at the time it was executed. One of the witnesses saw the testator make his mark. The other did not, but saw the signature by mark after it was made. Judge Walker, in discussing the case, said:

> "From these facts, if they be true, there can be no possibility of doubt that the testator subsequently saw and signed the will, and the presumption is that he adopted it as his will. If so, then it can make no matter who dictated, who wrote it, or when it was drafted. It was next urged that inasmuch as the testator signed the will by his mark, and it was shown that Wilder dictated it, it was not entitled to probate until the propounder proved that its contents were read to him (testator). *The will is found with his signature to it, and the presumption is that he did not sign it without knowing its contents. Such is the usual presumption in reference to all instruments, and we are aware of no distinction between persons who can and who can not write.* Anciently, when but few persons could write, and all persons executed instruments by attaching their private seal, the law presumed, when the execution of the instrument was proved, that the maker took the

precaution to learn the contents before he executed it, and to avoid it he was required to prove that it was a forgery. He was not permitted to escape its binding effect by merely saying that he did not know its contents, although he might by saying that it was falsely read to him."

In the case of Walton *vs.* Kendick, 122 Mo., 504 (25 Law Rep., 707), the court said:

> "It is not the mere physical act of signing that the witnesses attest; it is that the instrument signed by the testator is his will. That fact they are warranted in attesting upon the declaration of the person whose name is signed to the instrument (he being of sound mind and of lawful age), that the instrument so signed is his last will and testament, although they may never have seen him subscribe his own name to it in proper person nor another subscribe his name thereto at his request and in his presence."

The controversy in the case of Scott *vs.* Hank, was over the probate of a will signed by mark, the validity of the will was attacked on the ground that the proponents did not prove it to have been read over to the decedent before it was signed, or that the testator was informed of its contents. The court held that both of these were implied in the execution of the will.

In the case of Nickerson *vs.* Buck, 12 Cush., 341, the testator signed by mark. His name was attached to his mark. This was supposed to have been done by one of the attesting witnesses, who was dead at the time of the trial. In discussing the case Judge Dewey said:

> "It is proved that this witness had deceased before the trial, but the death of an attesting witness, or of all the attesting witnesses, is not to defeat the validity of a will, *if, in fact, duly executed.* It changes the form of proof, and allows of the introduction of secondary evidence of the due attestation and execution of the will. Such attestation is

> then to be shown, as it would be in the case of deeds, by proof of the handwriting of the witness. That being shown, prima facie, it is to be taken to be true, and to have been put there for the purpose stated in connection with the signature. It is to be assumed, as regards that witness, that he duly attested the will in the presence of and at the request of the testator."

And further on in the opinion the court said:

> *"Hence, if the witness be requested by the testator to sign his name to the instrument as an attesting witness, and the testator declares to the witness that the signature to the will is his, that is abundantly sufficient."*

The statute in force in the State of Massachusetts at the time this case was decided was the same in its provisions as that which was in force in the District of Columbia at the time of the execution of the will under discussion.

The will in the case of Upchurch *vs.* Upchurch, 16 B. Munroe, 110, was written by testator's brother, who was a devisee thereunder, at his request, and testator's name was subscribed thereto. This paper writing was produced by the testator with his name already subscribed, to which he affixed his mark, and it was acknowledged by him in the presence of the attesting witnesses to be his last will and testament. The court held the will to be well executed. The statute of Kentucky was similar in phraseology to that of the statute in this jurisdiction.

In the case of Bailey's Heirs *vs.* Bailey's Executor, 35 Ala., 689, the only question presented for the consideration of the court was in permitting at the trial of the case in the lower court the proponent to prove by the witnesses to the will that Shaderack J. Bailey made his mark to the name of John S. Bailey, and allowing the will to be read to the jury as evidence. The court held that

it was the settled construction of the English statute, and of similar statutes in the United States, that the signature of the testator, or of the witnesses, by making a mark, was sufficient.

> "Nor is it necessary that the name of the testator should appear on the face of the will, or be attached to the mark which he makes as his signature. If an amanuensis inaccurately writes the wrong name in the body of the will, or to the mark of the testator, the execution is, nevertheless, good, as the statute has not exacted correctness in these particulars, its requisition being merely that the will be signed by the testator, not that it be signed in the name of the testator, and any signature intended to authenticate the instrument would be sufficient for this purpose."

In the case of Smith *vs.* Dolby, 4 Harr, 351, the issue was devasavit vel non. The propounders of the will proved by the attesting witnesses that the testator signed the will by his mark. He said he would like to hear it read, but he was not able to sit up. He said that the draftsman who prepared the will had written a will for him once before and it was not as he wanted it, but added "maybe this is." The codicil was read. His name was already written to it with a space for his mark. He made his mark and said it was his will. The court held it was not necessary to read the will over. There was sufficient evidence that the testator knew its contents and would be taken to know them unless the contrary appeared. The reading was only necessary where children were entirely disinherited, and even then only in case of doubtful capacity of the testator.

The case of Rosser *vs.* Franklin, 6 Grattan, 25, the will was signed by mark. The court held that it was not necessary that the subscribing witnesses to a will should see a testator sign, or that he should acknowledge to them the subscription of the name to be his signature,

or even that the instrument is his will. It is sufficient that he should acknowledge in their presence that the act was his, with a knowledge of the contents of the instrument, with the design that it should be the testamentary disposition of his property.

The civil law required that one who offered for probate the will of a blind person must show that the writing was read to the testator and that he adopted it as his last will and testament in the presence of the subscribing witnesses thereto. The common law made no such requirement.

> "It is never necessary either in the case of an illiterate testator, or of one whose vision is affected, that the actual reading of the will in the presence of the witnesses should be shown. It is sufficient if it should appear by satisfactory evidence that the testator, so unable to read his will, has been made acquainted with its contents by any proper means."
>
> Underhill on the Law of Wills, vol. 1, sec. 118.

> "All that the law requires is that the evidence and circumstances surrounding the execution of the will satisfactorily shows that the deceased knew the contents of the paper writing which is offered for probate as a will, though the amount of the evidence required, its nature, and the degree of proof will depend altogether *upon the circumstances of the case.*"
>
> Underhill on the Law of Wills, vol. 1, sec. 141.

The quotation from Schouler on Wills in appellant's brief is a general statement of the principles governing the execution of testamentary writings made by the blind or illiterate. These rules have no special application to the circumstances attending the execution of the testamentary writing in controversy. The author is not discussing the presumption which arises

from facts such as were shown in evidence in the case below. The same remarks apply to the quotation from Williams on Executors and Jarmin on Wills. All that the law requires, as shown by these authorities, is that the testator knew and approved of the contents of the instrument, and this may be shown by any competent evidence that the testator was acquainted with the contents of the testamentary writing.

The statute of Maryland relating to wills, in force here at the time the will under discussion was executed, and by which its validity must be determined, is as follows:

> "All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed, in the presence of the said testator, by three or more credible witnesses, or else they shall be utterly void and of none effect."

The provisions of this statute are identical with those of section 5 of the statute of 29th Chas. II, Chap. 3, known as the Statute of Frauds.

In construing this statute the courts of Westminster have uniformly held that the mark of a testator was a sufficient signing and that notwithstanding the testator could write.

1 Jar. on Wills, 5th Ed., sec. 78, and cases cited.

The statute itself makes no distinction between the signature by mark and testator's writing his own name. It expressly provides that the name of the testator may be signed to the will by another if done in his presence and by his express direction. To require that a will signed by mark shall be read to the testator in the presence of the subscribing witnesses at the time of its execution, is to graft into the statute an additional provision.

Ought this to be done? No reason is perceived why this should be required in the case of the execution of wills any more than in the execution of deeds. Reading prior to execution is not necessary to the validity of a conveyance signed by mark. The law presumes that a party so signing knows the contents of the instrument signed. Many titles to real estate stand upon that presumption. The same principle applies to contracts signed by mark. It has never been deemed necessary in suits either at law or in equity to show that a contract signed by mark was read before its execution. Knowledge of the contents of the instrument is presumed from the signing. The reasoning that would reverse this principle of construction as applied to wills could be urged with equal force against deeds and contracts signed by mark. By such construction titles would become unsettled and the great land marks of the law prostrated.

In the case of Wynham *vs.* Chetwynd, 1 J. Burr., 414, Lord Mansfield, speaking on the formalities to be observed by a testator in executing a will under the terms of the statute, said:

> "Suppose the subscribing witnesses honest. How little need they know? They do know the contents. They need not be together. They need not see the testator sign. *If he acknowledges his hand it is sufficient. They need not know it to be a will. If he delivers it as a deed it is sufficient.*"

In the case at bar there can be no doubt about the identity of the instrument in question. It was first seen in the hands of the testatrix herself. She brought it to the attesting witnesses, made her mark thereto in their presence, declared the paper to be her will, and took it away with her. It is submitted that under this evidence the court might well have instructed the jury to return a verdict in favor of the validity of the will on the first and second issues.

There were suspicious circumstances tending the execution of the will in the case of Day *vs.* Day, 3 N. J. Eq., 552. The testator was in extremis when he signed it. It was never in his possession. He was too feeble to have signed it if it had been. It was not read to him. He was asked if it should be read and he did not reply. He was told by his son, who drew the will, that it was a copy of the will executed by testator the day before. That will was modeled after a previous one with an increase in a legacy to a favorite daughter. The will last signed, which was offered for probate in this case, was less favorable to the daughter than the first had been. The first and second wills were burned up by the son on the day the last will was executed. Could the court do otherwise than deny the validity of the will with such antecedents?

The facts found by the court in the case of Lake *vs.* Rainey, 33 Barb., 49, so far as they are material to the question under discussion, were substantially as follows:

First, *the proponent of the will drew it. He was at the time of its execution, and from thence on to the time of the death of the testator, a member of his family, and held a fiduciary and confidential relation to him.*

Second, *the testator was, by reason of his bodily and mental infirmities, peculiarly liable to be imposed upon by any one capable of practising a fraud upon him.*

Third, there was no evidence that the will was read to him, *or that he knew its contents.*

Fourth, *testator's estate was valued at about $9,000, and $8,000 of this property went, by the terms of the will, to his wife, and the balance to the executors of the will, of whom Rainey, the draftsman, was one.* The case was not tried by a jury, but was before the court on surrogate's finding of facts, and the effect of the decision of the court was simply to have the factum of the will determined by the verdict of a jury.

The facts tending the execution of the will attempted

to be established in the case of Waterson *vs.* Waterson, 38 Tenn., 1, tended to show that the instrument was the result of fraud practiced upon the testatrix. She was illiterate, unable to read or write, was very old, and kept silent in regard to the will. No one knew of it except the witnesses, who lived at a distance from the family. The paper writing was not produced for some years after the testatrix's death, and more than 25 years after the alleged will had been executed. There was no evidence that the will was read to the testatrix before she signed it. It was written by the principal legatee thereunder. In discussing the case the court admitted the general rule to be that the free and voluntary execution of a paper by any one in his right mind would be sufficient, prima facie, to establish a knowledge of its contents, but held that that presumption was rebutted by circumstances of fraud attending the preparation and execution of the instrument, such as were shown in this case.

In the case of Worthington *vs.* Klemm, 144 Mass., 167, the testatrix, designing to make some changes in a previously executed will, gave instructions to her scrivener to make the changes, and bring the new will to her to be executed. The will was drafted according to her instructions, carried to her, and she signed it as her will in the presence of the attesting witnesses. The scrivener offered to read the will to her, but she declined, and requested him to keep it in his custody till her death. She never read the will, nor was it read to her. The court held the will was properly executed, and that the law did not require it to be read to the testatrix before its execution; that it was sufficient if the court were satisfied by competent evidence that the contents of the will were known to the person executing it.

The case of Burritt *vs.* Sellman, 16 Barb., 198, cited by appellant, has no application to the case at bar. The

Statute of Wills of the State of New York requires publication to be made by the testator to the attesting witnesses. No such publication was made in that case and the court held that for want of it the will was not entitled to recognition as decedent's last will and testament. In addition to this the evidence showed that the testator's faculties had become seriously impaired by the use of strong drink and opium; that she never read the alleged will or heard it read; had nothing to do with its preparation, and its contents were never shown to have been stated to her. Neither the English Statute of Frauds or the Statute of Wills in force in this jurisdiction required the testator to make publication of the will.

The maxim, "*Non quod dictum est, sed quod factum est, inspicitur,*" determines the question of the validity or non-validity of the execution of the will.

In re Will of David G. Porter, 20 D. C., 496.

Fraud, undue influence, or suspicious circumstances, in addition to illiteracy, is present in all those cases, neither of which is found in the present case. Appellants' brief was not printed in time to enable the appellees to review the authories cited by them.

It is freely admitted that the presumption that a party signing a will by mark, or otherwise, knows its contents, is not a conclusive presumption; but it is urged that such a presumption must prevail in the absence of all proof of fraud, undue influence or want of testamentary capacity attending the execution of the will. No attempt was made to show that the testatrix of the will under discussion was not capable of making a valid deed or contract at the date of making the will; on the contrary the evidence shows that she was a woman of energy, capacity, and intelligence for a person in her station of life; nor was any proof offered of fraud or

undue influence present or operative in the production of the will. There was an entire absence of all proof of this character, and these issues were actually, if not formally, withdrawn or abandoned during the trial of the case below. The ruling of the lower court was not based alone on the legal presumption arising from the fact of the testatrix making her mark to her will, and its being attested by the requisite number of witnesses in her presence. That of itself was sufficient in the absence of fraud or undue influence to establish the will. She declared to the attesting witnesses the paper writing to which she made her mark to be her will. She brought it with her to Mr. Parker's office for the purpose of having it executed. She had ample opportunity to know its contents and provisions. She was a person of sound mind at the date of the will. It was executed and attested in a solemn manner. The will itself is reasonable and sensible in its provisions and conforms to her probable natural inclinations, and certainly to her moral obligations. The jury were instructed by the court that unless they believed and found from *all* the evidence that the contents of the paper writing was known to testatrix, they must find against the will. It is obvious that the verdict of the jury ought not to be disturbed and a new trial allowed, unless some error was made by the trial court in excluding evidence which ought to have been submitted to the consideration of the jury. This brings us to appellant's second point.

II.

That the court erred in excluding evidence of the declarations made by the testatrix prior and subsequent to the date of her will as to how she intended to dispose of her property.

Adolph F. Lipphard, husband of decedent, testified that his wife talked to him often, prior to the date of the

will, as to what she intended to do with her property after her death. In his direct examination, he was asked the following question:

"What did she say?" (meaning with respect to the disposition of her property by will).

To this question objection was made by the caveatees, and the witness was not allowed to testify as to statements made by his wife touching the testamentary disposition of her real property prior to the date of the will.

Albert R. Humphrey, another witness, testified that he had a conversation with Mrs. Lipphard about two years before she died. He was asked the following questions:

"Did she tell you how she had left her property, or how she was going to leave it? A. Yes, sir.

"What did she say to you in reference to that matter?"

To which caveatees objected, and the court sustained the objection. Counsel for appellants stated that he desired to show by this witness that testatrix denied leaving the property as mentioned in the will.

William A. Lipphard, one of the caveatees, was asked a similar question, and, upon objection, the court made a like ruling, excluding the evidence. He said that he had a conversation with her in reference to her will just before her death; that she told him how she had left her property. Witness was then asked the following question:

"What did she say?"

The caveatees objected to the admission of the evidence, and the court sustained the objection (Rec., p. 30).

Mrs. Sarah Lipphard, the wife of one of the caveatees, testified that 8 or 10 weeks before decedent died she asked her if she had made a will, and then she was asked the following question:

"What did she say in reference to what was in her will and what she had done with her property, if anything?"

On objection by the caveatees the evidence was excluded. Counsel for caveators stated to the court that he desired to show by this witness that testatrix had denied to the witness that she had left her property as and in the manner stated in her will. Did the court err in excluding the testimony offered?

It is not apparent from the record for what purpose this evidence was offered. Appellant's brief, however, shows that the offer was made in support of the issue of want of mental capacity in the testatrix at the time she made her will. Under the decision in the Throckmorton *vs.* Holt case the declarations of the testatrix made before or after the execution of the will, not a part of the res gestæ, would have been admissible for no other purpose. Justice Peckham, in deciding this case, said in this connection:

> "Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations as indicative of the state of his affections are no more admissible than would be his unsworn declarations as to any other fact."

Throckmorton *vs.* Holt, 180 U. S., 573.

Further on in the opinion the learned justice said:

> "When such an issue (one of mental capacity) is made it is one which relates to a state of mind which was involuntary and over which the deceased

had not the control of the sane individual, and his declarations are admitted, *not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity.*"

Id., p. 574.

"It is apparent, therefore, that the declarations of the deceased are properly received upon the question of a state of mind whether mentally strong and capable, or weak and incapable, and that *from all the testimony, including his declarations,* his mental capacity can probably be determined with considerable accuracy."

In any case, before such declarations are admissible, there must be a foundation laid by other evidence tending to show want of testamentary capacity in the testator at the time of making his will.

Gibson *vs.* Gibson, 24 Mo., 227.
Throckmorton *vs.* Holt, supra, 575.

The case of Waterman et al. *vs.* Whitney et al., 11 N. Y., 157, is an interesting and well argued case on the subject under discussion. In deciding the case Judge Selden, speaking for the court, said:

"The offer was to prove declarations of the testator stating the contents of the will to be entirely different from what they were in fact, and these declarations *were offered in connection with other evidence bearing upon the competency of the testator at and before the execution of will,*"

and held the evidence admissible, *provided the declarations were not too remote in point of time from the execution of the will.*

In the case of Shailer *vs.* Bumstead, 99 Mass., 123, Judge Colt, discussing the point in question, said:

> " Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, *provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question.*"

One of the issues in this case was that testatrix was of unsound mind when she made the will in 1853; and there was evidence tending to show both bodily and mental infirmity at that date. The declarations offered in evidence were made in 1854.

No foundation was laid for the admission of this evidence. Not a syllable of testimony was adduced by appellants to show want of testamentary capacity at the date of the will. For aught the record shows she retained her mental powers up unto the time of her death, which took place five years and eight months after making her will. Appellants did not state what they expected to prove by decedent's husband. For aught it appears that he may have testified, if permitted, that the provisions of his wife's will were such as she told him they would be. The offer is too indefinite to be considered.

The evidence of William A. Lipphard is subject to like objection. Appellants' counsel failed to state what they expected to prove by this witness. This witness testified on cross-examination that he did not know his mother had made a will until after her death. In his direct examination he stated that she told him in a conversation had with her a week before she died how she had disposed of her property by her will (Rec., pp. 29 and 30).

His evidence, if admissible, is without probative force or value. Appellants offered to prove by Albert R. Humphrey that the testatrix, two years prior to her death, denied leaving her property as provided by her will. A similar offer was made with respect to the witness, Mrs. Sarah Lipphard, wife of Adolph Lipphard, with the exception that the alleged conversation with decedent took place with this witness eight or ten weeks before her death. Had the conversation of these last two witnesses been admissible under any circumstances, it took place at a period too remote to throw any light on the mental condition of the testatrix at the time the will was made. The conversation was irrelevant from any view. It had no tendency to throw any light on the mental condition of testatrix when the will was made. She was justified in law, if not in morals, in misleading her relatives as to the contents of her will.

In the case of Boylan *vs.* Meeker, 4 Dutcher (28 N. J. Law), 274, the court said:

> "He (meaning the testator) may, to secure his own peace and comfort during life, to relieve himself from unpleasant importunities of expectant heirs, conceal the nature of his testamentary dispositions, and make statements calculated and intended to deceive those with whom he is conversing. He has neither the sanctity of an oath nor the strong bond of self-interest to secure his adherence to the truth. The experience of everyone must satisfy him that an inquiry made of a testator, as to the contents of his will, rarely illicits the truth."

The argument in appellants' brief in support of the admission of this evidence is based on the theory that the declarations of a testator are admissible touching the disposition of his property by will, that it is only necessary to have an issue of want of mental capacity, and

that the door is then open for the admission of any statements made by a testator prior or subsequent to the execution of his will. It is respectfully submitted that this view is directly opposed to that of *this* court, as announced in the case of Throckmorton *vs.* Holt, supra, and is contrary both to authority and principle.

Respectfully submitted.

B. F. LEIGHTON,
C. CLINTON JAMES,
Attorneys for Appellees.

LIPPHARD *v.* HUMPHREY.

ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 188. Argued March 20, 1908.—Decided April 6, 1908.

Inability to read does not create a presumption that a testator does not know the contents of a paper declared by him to be his last will and duly executed as such.

There is a presumption that the testator does know the contents of a will properly executed, which, while not conclusive, must prevail in the absence of proof of fraud, undue influence or want of testamentary capacity, even where testator's inability to read is proved.

In the absence of proof of want of testamentary capacity at the date of the will, declarations of the testator as to the contents thereof are inadmissible to prove lack of knowledge of such contents.

28 App. D. C. 355, affirmed.

LORAINE LIPPHARD, of the District of Columbia, died December 9, 1903, leaving a paper writing purporting to be her last will and testament, bearing date April 27, 1898, duly attested by three witnesses, and naming Rev. Mr. Meador as executor.

Decedent left surviving her as her next of kin and sole heirs at law her husband, Adolph F. Lipphard, Sr.; three sons, named John, William A. and Adolph F. Lipphard, Jr.; two daughters, named Sophia L. Hellen, born Lipphard, and Capitola L. Anderson, born Lipphard; sixteen grandchildren, four of whom were infants under the age of 21 years. All the other of her heirs and next of kin were of lawful age.

Decedent's property consisted of a small quantity of personal property valued at $350 and some real estate valued at $10,000.

The husband, Adolph F. Lipphard, Sr., and two of the sons, William A. and Adolph F. Lipphard, Jr., filed a caveat to the probate of the will. All of the other next of kin and heirs at law became parties in one way or another. Before the issues were framed on the caveat the Rev. Mr. Meador departed this life. Thereupon decedent's daughters, Capitola L. Anderson

and Sophia L. Hellen, beneficiaries under the writing, petitioned the court for leave to propound said paper writing as and for the last will of decedent, and an order was passed by the court below authorizing this to be done. Thereafter a decree was passed framing issues upon the caveat to be tried by a jury. The issues were five in number and were as follows:

"1. Was the paper writing dated April 27, 1898, the last will and testament of said Loraine Lipphard?

"2. Was the said writing executed and attested in due form, as required by law?

"3. At the time of the execution of said paper writing, was the said Loraine Lipphard of sound and disposing mind and capable of making a valid deed or contract?

"4. Was said writing procured by fraud or undue influence, practiced upon her by any person or persons?

"5. Was the signature of the said Loraine Lipphard procured by force exercised upon her by any person or persons?"

Barnard, J., presiding at the trial of the issues, directed the jury to find the third, fourth and fifth issues in favor of the caveatees, on the ground that the evidence was insufficient to warrant the jury in finding a verdict thereon in favor of the caveators. The first and second issues were submitted to the jury with instructions by the court to the effect that unless the jury believed that the contents of the paper were known to testatrix at the time of execution, they should find for the caveators. If, however, they should find from the evidence that testatrix did know the contents of the paper and did sign the same by her mark in the presence of witnesses, who signed the same as witnesses in her presence, the verdict should be in favor of the caveatees. The jury found the issues in favor of the caveatees, and the will was accordingly admitted to probate and record May 3, 1906.

From this decree the caveators appealed to the Court of Appeals of the District of Columbia, which affirmed the decree of the Supreme Court of the District (28 App. D. C. 355), and thereupon the case was brought to this court.

The paper writing in controversy was witnessed by three credible witnesses, all of whom testified as witnesses for the caveatees. From their testimony it appeared that on the twenty-seventh day of April, 1898, Mrs. Loraine Lipphard brought the writing to the office of Miss Parker, one of the attesting witnesses, with whom she had long been acquainted, and told her that it was her last will and testament, and that she wanted it attested by three witnesses. Two other witnesses with whom she was also acquainted, one of them for forty years, were procured, and all three being present, testatrix declared the paper writing to be her will and signed it by her mark thereto in the presence of all the witnesses, and they signed their names thereto as attesting witnesses in her presence. The testatrix was at the time of sound mind and capable of making a valid deed or will. The will was not read in the presence of the witnesses, and after the testatrix had subscribed her "mark" and the will had been witnessed, it was handed to her and she took it away with her. After Mrs. Lipphard's death the will was produced by Rev. Mr. Meador and given by him to an attorney, who lodged it in the office of the register of wills.

Evidence was adduced on the trial on behalf of the caveators that Mrs. Lipphard could not read or write; that she was a licensed midwife and had a great number of cases; that the title to the real estate devised by the will was originally in her husband; that in March, 1857, he put a trust on the property, and it was subsequently sold thereunder; that he afterward took title to the property and again it was sold, and then the title was taken in the wife's name. The husband's testimony tended to show that he was improvident. Testatrix was an energetic woman and a good wife. Part of the property when purchased was vacant land. In 1894 this land was improved by two houses. Testatrix made the contract for the erection of these houses and attended to the building of the same. The husband and wife had lived happily together for sixty-five years.

The will devised and bequeathed the entire estate of the testatrix to the Rev. Chastain C. Meador in trust: (1) To pay all funeral expenses and debts; (2) For the use of her husband, Adolph F. Lipphard, during his life; (3) To pay the expenses of said husband's last illness and funeral; (4) Upon the death of the husband to divide the same among children named, according to the directions therein contained; the trustee also being appointed executor. The real estate consisted of three lots, two of which were specifically devised to the two daughters.

Mr. Chapin Brown, with whom *Mr. Charles H. Bauman* and *Mr. J. P. Earnest* were on the brief, for plaintiffs in error and appellants:

When once the foundation has been laid by proving that the alleged testator was illiterate, and could not read or write or sign his name, or that it was doubtful from any other cause whether he knew the contents of the will, the declarations of the alleged testator are admissible in evidence to show whether he knew or did not know, the contents and provisions of the alleged will. *Harleston* v. *Corbett*, 12 Rich. (S. C.) 604; *Watterson* v. *Watterson*, 38 Tennessee (1 Head), 1; *Cox* v. *Cox*, 4 Sneed (Tenn.), 81; *Rollwagen* v. *Rollwagen*, 63 N. Y. 504; *Selden* v. *Myers*, 20 How. 506; *Adams* v. *Norris*, 23 How. 353; Jarman on Wills, 6th ed., Vol. 1, p. 47; Underhill on the Law of Wills, Vol. 1, p. 201.

The evidence which the caveators offered to produce tending to show that the alleged testatrix did not know the contents of the instrument alleged to be her will, is competent and should have been admitted. *Waterman* v. *Whitney*, 11 N. Y. 157; *Barbour* v. *Moore*, 4 App. D. C. 535; *Olmstead* v. *Webb*, 5 App. D. C. 30; *Adams* v. *Norris*, 23 How. 353; *Thompson* v. *Updegraff*, 3 W. Va. 629 (cited in the *Holt case*); *Couch* v. *Eastman*, 27 W. Va. 796 (cited in the *Holt case*); *Cranmer* v. *Anderson*, 11 W. Va. 582; *Jarretts* v. *Jarretts*, 11 W. Va. 584; *Mathews* v. *Warner*, 4 Ves. 186; *Pemberton* v. *Pemberton*, 13 Ves. 290; *Norris* v. *Sheppard*, 20 Pa. St. 275; *Neel* v. *Potter*, 40 Pa. St. 283; *Storrett* v. *Douglass*, 2 Yeates, 46; *Trumbull* v.

Gibbons, 2 Zab. 140; *Crispell* v. *Dubois*, 4 Barb. 399; *Stewart's Exr's* v. *Lispenard*, 26 Wend. 261; *Throckmorton* v. *Holt*, 180 U. S. 552, discussed and distinguished from the case at bar.

Mr. B. F. Leighton and *Mr. C. Clinton James* for defendants in error and appellees.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

The contention of appellant is that as testatrix could not read, and as the will was not read to her at the time of its execution, it was therefore to be presumed that she did not know the contents of the will when she executed it, or that the jury ought not to have been allowed to presume from the evidence produced before them that the testatrix had knowledge of the contents of the will.

Mrs. Lipphard brought the will with her to the office of one of the attesting witnesses for the purpose of execution, and after its execution took it away with her, and at her death it appeared in the possession of the Rev. Mr. Meador, the executor named therein, and by whom it was propounded for probate and record. She declared to the witnesses that it was her will, and requested them to attest it as such; and its provisions were reasonable and natural. She was shown to be a woman of intelligence and business capacity; she was in bodily and mental health and vigor when the instrument was executed; and there was no suggestion of fraud or undue influence in the case.

In these circumstances the jury properly concluded that the testatrix knew the contents of the will at the time of its execution, and the court might well have directed such finding, unless the bare fact of the inability of testatrix to read raised a legal presumption that she did not possess that knowledge, and the absence of the reading of the will to her at that time was fatal. But we know of no such presumption as mat-

ter of law, and on the contrary, the presumption where a will is properly signed and executed is that the testator knows the contents. Where there is evidence of the practice of fraud or of undue influence, affirmative proof of knowledge of the contents may be necessary, but not so in any other case, simply because of a presumption arising from inability to read. *Taylor* v. *Creswell*, 45 Maryland, 422, 431; *Vernon* v. *Kirk*, 30 Pa. St. 224; *King* v. *Kinsey*, 74 N. C. 261; *Hoshauer* v. *Hoshauer*, 26 Pa. St. 404; *Clifton* v. *Murray*, 7 Georgia, 565; *Doran* v. *Mullen*, 78 Illinois, 342; *Walton* v. *Kendick*, 122 Missouri, 504; *Nickerson* v. *Buck*, 12 Cush. 341; *Guthrie* v. *Price*, 23 Arkansas, 407.

In the latter case testatrix's name was subscribed to the will, and between her Christian and surname was her mark in the form of a cross. The attesting witnesses signed the will at her request, in her presence, and in the presence of each other. She produced the paper writing for them to attest and declared that it was her will, and that she desired them to witness it as such. She did not write her name, but made her mark to the paper. It was not shown who did write her name to the will. It was not written by either of the witnesses, nor in their presence. Testatrix could not read, and the will was not read to her in the presence of or to the knowledge of the witnesses. The trial court instructed the jury, in effect, that notwithstanding the will was executed in accordance with the formalities prescribed by the statute, yet it being shown that the testatrix could not read, the will was invalid, unless it was proved that it was read to her and that she was informed as to its contents. After a review of the authorities, the Supreme Court of Arkansas held such instruction to be erroneous, and Chief Justice English, in the concluding part of his opinion, said:

"It was proven that she could not read, and it was not shown that the will was read to her at the time it was executed, but it may have been before. She produced the will herself, declared it to be her will, asked the witnesses to attest it as

such, signed it by making her mark. She was a woman of good sense, particular about her business transactions, and manifested her usual soundness of mind at the time. It is not shown that she was laboring under any feebleness of mind from disease, or approaching dissolution. The provisions of her will appear to be reasonable. It is not shown that any imposition was practiced upon her, or that her sons had any agency in the preparation of the will. It was erroneous for the court to tell the jury as a matter of law that it being shown that she could not read, it was necessary to prove that the will was read to her. They had the right to infer, from all of the circumstances, that she knew the contents of the will, though, as shown by the authorities above quoted, in determining whether there was fraud or imposition in the execution of the will, the fact that she could not read, and that the will was not read to her, at the time she signed it, were circumstances to be considered by the jury."

True, the presumption that a party signing a will by mark, or otherwise, knows its contents, is not a conclusive presumption, but it must prevail in the absence of proof of fraud, undue influence, or want of testamentary capacity attending the execution of the will. In the present case there was no attempt to show that the testatrix was not capable of making a valid deed or contract at the date of making the will; on the contrary, the evidence showed that she was a woman of energy, capacity and intelligence. Nor was any proof offered of fraud or undue influence in the production of the will. Mrs. Lipphard brought the will, as we have said, to Miss Parker's office for the purpose of having it executed; she declared to the attesting witnesses the paper to which she made her mark to be her last will and testament. She was a person of sound mind at the date of the will, and it was executed and attested in the manner required by statute.

It is obvious that the verdict of the jury ought not to be disturbed and a new trial allowed, unless some reversible error was committed in the course of the trial, and appellants insist

that such error existed in the exclusion of evidence of declarations alleged to have been made by the testatrix prior and subsequent to the date of her will as to how she intended to dispose, or had disposed, of her property.

Decedent's husband testified that his wife talked to him often, prior to the date of the will, as to what she intended to do with her property after her death, and that they talked the matter over after the date of the will. He was asked what she said, but objection to the question was sustained. Appellants did not state what they expected to prove by the husband.

Albert R. Humphrey, another witness, testified that he had a conversation with Mrs. Lipphard about two years before she died. He was asked the following questions:

"Did she tell you how she had left her property, or how she was going to leave it? A. Yes, sir.

"What did she say to you in reference to that matter?"

To which caveatees objected, and the court sustained the objection. Counsel for appellants stated that he desired to show by this witness that testatrix denied leaving the property as mentioned in the will, this being more than three years after the will was executed.

William A. Lipphard, one of the caveatees, was asked a similar question, and, upon objection, the court made a like ruling, excluding the evidence. He said that he had a conversation with her in reference to her will just before her death; that she told him how she had left her property.

Mrs. Sarah Lipphard, the wife of one of the caveatees, testified that eight or ten weeks before decedent died she asked her if she had made a will, and then she was asked the following question:

"What did she say in reference to what was in her will and what she had done with her property, if anything?"

On objection by the caveatees the evidence was excluded. Counsel for caveators stated to the court that he desired to show by this witness that testatrix had denied to the witness

that she had left her property as and in the manner stated in the will.

Appellants' brief asserts that the offer was made in support of the issue of want of mental capacity in the testatrix at the time she made her will.

In *Stevens* v. *Vancleve*, 4 Wash. C. C. 262, 265; *S. C.*, 23 Fed. Cases, 35, Mr. Justice Washington said that declarations of a deceased, prior or subsequent to the execution of a will, were nothing more than hearsay, and that there was nothing more dangerous than their admission, either to control the construction of the instrument or to support or destroy its validity.

In *Throckmorton* v. *Holt*, 180 U. S. 573, Mr. Justice Peckham, speaking for the court, expressed the opinion, after much consideration, that the principles upon which our law of evidence is founded necessitated the exclusion of such evidence, both before and after the execution, saying:

"The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestæ* are not within any of the recognized exceptions admitting evidence of that kind.

"Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

* * * * * * * *

"When such an issue (one of mental capacity) is made it is one which relates to a state of mind which was involuntary, and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evi-

dence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity.

* * * * * * * *

"It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of a state of mind, whether mentally strong and capable, or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy."

And see *In re Kennedy*, 167 N. Y. 163, 176. In *Shailer* v. *Bumstead*, 99 Massachusetts, 123, it was ruled:

"Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question."

In the present case no foundation was laid for the admission of this evidence. Not a syllable of testimony was adduced by appellants to show want of testamentary capacity at the date of the will. For aught the record shows, she retained her mental powers up to the time of her death, which took place five years and eight months after making her will.

As we have said, appellants did not state what they expected to prove by decedent's husband, nor what they expected to prove by the evidence of William A. Lipphard. This witness testified on cross-examination that he did not know his mother had made a will until after her death. In his direct examination he stated that she told him, in a conversation had with her a week before she died, how she had disposed of her property by her will.

And so the offer to prove by Albert R. Humphrey, that the testatrix two years prior to her death, and more than

three years after the execution of the will, denied giving her property as provided by her will, or the similar offer made with respect to the witness Mrs. Sarah Lipphard, wife of Adolph Lipphard, as to alleged conversations with decedent eight or ten weeks before her death, were at a period too remote to throw any light upon the mental condition of the testatrix at the time the will was made.

There was no evidence whatever of mental incapacity and this particular evidence was too remote to justify any reasonable inference to that effect, and if there was no lack of mental capacity, then this evidence would have no tendency to show that she did not have knowledge of the contents of the will when she executed it and declared it to be her last will and testament. Because she may have resisted importunity for information in respect to what she had done, three years after she had made her will, it does not follow that she did not know the contents of the will when she made it. There must be some other proof, some suspicious circumstances, some evidence of fraud or undue influence before evidence of conversations years after the execution of the will should be admitted to show that she did not know what she was doing when she made it.

Decree affirmed.